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No.

IN THE
Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS,
Individually and on Behalf of Others
Similarly Situated,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cost-of-living adjustment that a defined benefit pension plan has the discretion to provide to participants who elect to receive their benefits as a monthly annuity payment and that is explicitly excluded from the plan's definition of "accrued benefit" nevertheless constitutes part of every participant's "accrued benefit" under ERISA, 29 U.S.C. § 1002(23)(A), and therefore must also be provided to participants who select a one-time lump-sum distribution of their benefits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Rohm and Haas Pension Plan has no parent company and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' INTERPRETATIONS OF THE TERM "ACCRUED BENEFIT" UNDER ERISA 11

II. THE SEVENTH CIRCUIT'S *PER SE* APPROACH TO DEFINING "ACCRUED BENEFIT" IS INCONSISTENT WITH ERISA'S PLAIN LANGUAGE AND LEGISLATIVE OBJECTIVES 19

III. THE DECISION BELOW VASTLY INCREASES THE RISK OF PLAN UNDERFUNDING AND TERMINATION 23

CONCLUSION 26

APPENDIX A: Opinion of the United States Court of Appeals for the Seventh Circuit 1a

APPENDIX B: Opinion of the United States District Court for the Southern District of Indiana 9a

APPENDIX C: Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing and Rehearing En Banc 42a

APPENDIX D: The Rohm and Haas Company Retirement Plan (Administrative Record 00022) 44a

APPENDIX E: The Rohm and Haas Company Retirement Plan: Summary Plan Description (Administrative Record 00277) 68a

TABLE OF AUTHORITIES

Page(s)

CASES

Ala. Power Co. v. Davis,
431 U.S. 581 (1977) 4

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 3, 19, 23

Am. Stores Co. v. Am. Stores Co. Retirement Plan, 928 F.2d 986
(10th Cir. 1991) 22

Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan,
854 F.2d 1516 (3d Cir. 1988) 15, 16, 22

Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r,
318 F.3d 599 (4th Cir. 2003) 10, 11, 12, 13, 14

Black & Decker Disability Plan v. Nord,
538 U.S. 822 (2003) 20

Cent. Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 3, 4, 19, 20

De Nobel v. Vitro Corp.,
885 F.2d 1180 (4th Cir. 1989) 16, 17

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 15

Esden v. Bank of Boston,
229 F.3d 154 (2d Cir. 2000) 18

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 20

Hein v. FDIC, 88 F.3d 210 (3d Cir. 1996) 16

Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union, 980 F.2d 465 (7th Cir. 1992) 8, 9, 21

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 4

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 3, 19

Mead Corp. v. Tilley, 490 U.S. 714 (1989) 2, 9

Musmeci v. Schwegmann Giant Super Mkts., Inc., 332 F.3d 339 (5th Cir. 2003) 12

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 18

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980) 3, 24

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004) 25

San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp., 1994 WL 198663 (9th Cir. 1994) 10, 12, 13

Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir. 1985) 17, 18

STATUTES

I.R.C. § 411(a)(7)(A)(i) 11

Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 25

29 U.S.C. § 1002(23)(A) ..... i, 2, 4, 19, 21

29 U.S.C. § 1054(c)(3) 5, 23

29 U.S.C. § 1054(g) 4, 22, 23

REGULATIONS

TD Release No. 9256, *Revised Regulations Concerning Disclosure of Relative Values of Options Forms of Benefit*, 71 Fed. Reg. 14,798 (Mar. 24, 2006) 17

Treas. Reg. § 1.411(a)-11 5

OTHER AUTHORITIES

Comm. on Educ. & Workforce, U.S. House of Representatives, Nation's Editorial Pages Highlight Pension Crisis (Dec. 1, 2005) 24

Alison Grant, *Pension Safety Net Is Getting Tattered; Federal Agency Could Run Out of Money as Bankruptcies Mount*, Plain Dealer (Cleveland), July 2, 2006, at A1 25

Ellen E. Schultz et al., *Tracking the Numbers / Outside Audit: Forecast: More Pension Freezes*, Wall St. J., Jan. 12, 2006, at C1 24

Testimony of Bradley D. Belt, Executive Dir. PBGC, Before the Comm. on Budget, United States Senate, *at* http://www.pbgc.gov/media/news-archive/testimony/tm13070.html (last accessed Jan. 7, 2008) 25

US Airways Reaches a Deal over Terminated Pensions, N.Y. Times, Aug. 27, 2005, at C3 4

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rohm and Haas Pension Plan ("Plan") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 497 F.3d 710. Pet. App. 1a. The order denying the petition for rehearing and rehearing en banc is unreported. *Id.* at 42a. The opinion of the United States District Court for the Southern District of Indiana is unreported. *Id.* at 9a.

JURISDICTION

The court of appeals filed its opinion on August 14, 2007. It denied petitioner's timely petition for rehearing and rehearing en banc on October 10, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C. § 1002 provides, in relevant part:

§ 1002. Definitions

. . . .

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age . . . .

STATEMENT

This case affords the Court the opportunity to resolve an irreconcilable split among the lower courts regarding the definition of "accrued benefit" under the Employee Retirement Income Security Act ("ERISA")—a question that this Court has acknowledged to present "complicated and important issues pertaining to the private pensions of millions of workers." *Mead Corp. v. Tilley*, 490 U.S. 714, 726 n.11 (1989). In the decision below, the Seventh Circuit held that a cost-of-living adjustment ("COLA") available under the terms of the Plan to participants who elect to receive their benefits as a monthly annuity payment is part of the Plan participants' "accrued benefit"—even though the Plan's provisions explicitly *exclude* the COLA from the definition of "accrued benefit"—and that the COLA must therefore be provided to every participant in the Plan, including those who select a one-time lump-sum distribution of their benefits. The Seventh Circuit's conclusion that a COLA is *per se* a component of a plan participant's "accrued benefit" is directly at odds with decisions from the Fourth and Ninth Circuits holding that a COLA is only a component of a participant's "accrued benefit" where the terms of the plan so provide, and with the definition of "accrued benefit" under ERISA, which expressly states that an "individual's accrued benefit" is to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

The Seventh Circuit's decision disregards the unambiguous terms of the Plan and unilaterally expands the benefits available to participants beyond those they could reasonably have expected to receive under the Plan. In so doing, the decision exposes defined benefit pension plans to new and unforeseen financial liabilities that may leave many such plans

chronically underfunded and may compel some employers to terminate their plans altogether.

Certiorari is warranted to resolve the lower courts' pervasive disagreement regarding the definition of "accrued benefit" under ERISA, to reconcile the decision below with ERISA's plain statutory language, and to ensure that defined benefit pension plans—many of which are already facing significant funding shortfalls—are not saddled with new liabilities that employers never agreed to assume and may be unable to absorb.

1. Congress enacted ERISA to "protect[ ] employees' justified expectations of receiving the benefits their employers promise them." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). As an initial matter, "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). If an employer does decide to establish a pension plan, however, that plan must comply with the employee participation requirements, funding standards, and fiduciary obligations imposed by ERISA. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 n.5 (1981). ERISA therefore "mak[es] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

ERISA recognizes two principal categories of pension benefit plans. Under a defined contribution plan, "the employer's contribution is fixed and the employee receives whatever level of benefits the

amount contributed on his behalf will provide." *Ala. Power Co. v. Davis*, 431 U.S. 581, 593 n.18 (1977). In contrast, under a defined benefit plan, "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Id.* Under the defined benefit model, "the employer typically bears the entire investment risk and . . . must cover any underfunding as a result of a shortfall that may occur from the plan's investments." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (internal quotation marks omitted). Because the accrued benefits under a defined benefit plan cannot be reduced, economic downturns and unforeseen liabilities can complicate employers' efforts to maintain an adequately funded plan. Indeed, funding shortfalls have recently compelled a large number of companies to terminate their plans altogether. *See, e.g., US Airways Reaches a Deal over Terminated Pensions*, N.Y. Times, Aug. 27, 2005, at C3.

The concept of an "accrued benefit" is central to the protections that ERISA provides to plan participants. For defined benefit pension plans, ERISA defines the "accrued benefit" as an "individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). A participant's accrued benefit is protected by ERISA's "anti-cutback rule," which "prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.'" *Heinz*, 541 U.S. at 741 (citing 29 U.S.C. § 1054(g)).

The default means of distributing the accrued benefit to a participant in a defined benefit pension plan is through monthly annuity payments commencing at normal retirement age and continuing for

the remainder of the participant's life. Some plans also provide participants with the option of selecting a one-time lump-sum distribution of their accrued benefit. That lump-sum payment must be the "actuarial equivalent" of the accrued benefit expressed in the form of a single-life annuity. 29 U.S.C. § 1054(c)(3).[1]

2. Rohm and Haas Company sponsors a defined benefit pension plan, which provides its employees with retirement benefits based on their years of service and compensation. Pet. App. 2a. The Plan affords participants several payment options. *Id.* As required by ERISA, the default payment options are a single-life annuity for an unmarried participant or a qualified joint and survivor annuity for married participants, which provide participants with a monthly benefits payment for the remainder of their lives. *Id.* at 44a, 45a. Other payment options include a one-time lump-sum distribution of benefits, which is calculated by determining the present value of the participant's accrued benefit using the actuarial assumptions set forth in an appendix to the Plan. *Id.* at 57a.

Although not required by ERISA to provide enhanced benefits to account for changes in the cost of living, the Plan provides that monthly annuity pay-

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[1] Treasury regulations provide guidelines for determining the "actuarial equivalent" of the accrued benefit. *See* Treas. Reg. § 1.411(a)-11. The "actuarial equivalent" is generally determined by using established mortality tables to calculate the accrued benefit that the participant would have received had he elected the monthly annuity and then discounting that amount to its present value on the date of the lump-sum distribution.

ments made after the age of sixty can be increased annually—through a COLA capped at 3%—to offset inflation. Pet. App. 59a. The COLA is not included in the sections of the Plan that define a participant's "accrued benefit." The COLA is instead found in a wholly different section of the Plan—entitled "Cost-Of-Living Adjustments To Pensions"—which provides that a participant "receiving monthly payments[ ] shall be entitled to an annual Cost-of-Living Adjustment." *Id.*

The COLA's exclusion from a participant's accrued benefit is reiterated in the Summary Plan Description, which provides:

> ***What is a "COLA" and am I eligible to receive it?*** The cost of living adjustment or "COLA" is an annual adjustment to monthly payments from the Plan intended to keep pace with inflation. . . . The COLA only applies to monthly payments; it does NOT apply if you receive your benefit in the form of a cash lump sum. The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law. . . .

Pet. App. 68a-69a. The Plan therefore informs participants in unambiguous terms that the COLA is excluded from the definition of "accrued benefit" and is not available to participants who select a lump-sum distribution of their benefits.[2]

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[2] It is undisputed that the Plan does not define the COLA as part of a participant's "accrued benefit." *See* Pet. App. 4a ("The parties agree that the plain terms of the Plan exclude the COLA from a participant's accrued benefit."). An examination

3. Respondent was employed by Rohm and Haas Company from 1969 until he was terminated in 1997. Pet. App. 3a. Upon his termination, respondent chose to receive his pension in a one-time lump-sum distribution of $47,850.71. *Id.* Seven years later, he filed suit in the United States District Court for the Southern District of Indiana, alleging that the Plan had violated ERISA by failing to include in his lump-sum distribution the present value of the COLA that he would have received had he selected

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[Footnote continued from previous page]

of the Plan confirms that the COLA is not a component of the "accrued benefit" under the terms of the Plan. Section 3.1 of the Plan defines "Accrued Benefit" as "that portion of a Participant's Basic Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date." Pet. App. 44a. Section 7.1 provides the formula for the Basic Amount of Normal Retirement Pension in terms of level of compensation and years of service. *Id.* at 45a. The COLA is not part of the Section 7.1 formula. Nor is the COLA referenced anywhere in Article XI, which governs the Amount of Pension Payable at Retirement. *Id.* at 55a. Moreover, Section 12.1.4 of the Plan defines a "lump sum distribution" as an optional form of retirement benefit to be "determined in accordance with Appendix D." *Id.* at 57a. Appendix D, in turn, presents interest rates and mortality tables, but does not reference the COLA. *Id.* at 62a.

The COLA is set forth in a separate Article XV that follows—and makes no reference to—the Article VII formula for the Basic Amount of Normal Retirement Pension and the Article XI provisions regarding the amount of pension payable at retirement. Pet. App. 59a. The COLA is not available to all participants, but is instead restricted to retirees over the age of sixty "who [are] receiving monthly payments." *Id.* The COLA thus applies only after a participant has already selected an annuity and is actually receiving monthly payments.

the monthly annuity option. The district court certified a class comprised of former Plan participants who received a lump-sum distribution that did not take a COLA into account. *Id.*

The parties filed cross-motions for summary judgment on the legal issue whether the COLA was part of the Plan participants' accrued benefit under ERISA, and the district court granted respondent's summary judgment motion. Pet. App. 3a. The district court held that "the Plan's definition of 'Accrued Benefits' does not satisfy ERISA's definition of that term because the COLA enhancement was not included when calculating the value of his lump sum distribution." *Id.* at 40a. The district court nevertheless "acknowledge[d] that substantial complications in administering such a provision may result" from its decision because "COLAs are typically both speculative and contingent, turning on future economic tides which are unknowable at the time a lump sum payment is made." *Id.* In light of these practical complications and the legal uncertainty surrounding the issue, the court certified the question for interlocutory appeal.

4. The Seventh Circuit granted leave to appeal and affirmed. The court acknowledged that "ERISA itself . . . look[s] at the individual plan's terms in order to discern the accrued benefit" and that the Plan defines "the COLA to be an enhancement that is awarded to annuitants, over and above the accrued benefit." Pet. App. 5a, 6a. The court of appeals nevertheless relied on its earlier decision in *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992), to hold that the "term 'accrued benefit' has a statutory meaning, and the parties cannot change that meaning by simply labeling certain benefits as 'accrued benefits' and

others, such as the COLA, as 'supplementary benefits.'" Pet. App. 6a-7a (citing *Hickey*, 980 F.2d at 468). The Seventh Circuit reasoned that—regardless of whether the terms of a plan exclude a COLA from the definition of "accrued benefit" or make payment of a COLA discretionary—a COLA paid to participants who receive monthly annuity payments is always encompassed by the "statutory meaning" of "accrued benefit" because "the 'accrued benefit' is that benefit a participant would be entitled to if he chose to receive it in the form of a single-life annuity." *Id.* at 5a. The court therefore concluded that, "[i]f a defined benefit pension plan entitles an annuitant to a COLA, it must also provide the COLA's actuarial equivalent to a participant who chooses instead to receive his pension in the form of a one-time lump sum distribution." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit held that a COLA offered by a defined benefit pension plan is *always* part of a participant's accrued benefit, even if expressly excluded from the plan's definition of that term. The Seventh Circuit's categorical approach to defining "accrued benefit" squarely conflicts with decisions in which other circuits have used a case-by-case inquiry dependent on the terms of the specific plan at issue to define a participant's accrued benefit. In light of the circuits' conflicting approaches to defining one of ERISA's most fundamental terms—and the undeniable "importan[ce]" of this issue "to the private pensions of millions of workers" (*Mead Corp. v. Tilley*, 490 U.S. 714, 726 n.11 (1989))—this Court's review is warranted.

In the specific context of COLAs, the Fourth and Ninth Circuits have both endorsed the case-by-case

approach explicitly rejected by the Seventh Circuit. *See Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599 (4th Cir. 2003); *San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994). Those courts look to the terms of the plan at issue to determine whether a COLA is a component of a plan participant's accrued benefit. This case would have been decided differently in either of those circuits because the terms of the Rohm and Haas Pension Plan unambiguously exclude the COLA offered to monthly annuitants from the definition of "accrued benefit." Such interpretive inconsistency immeasurably complicates the task of plan actuaries and substantially undermines the uniform regulatory regime that Congress sought to establish when it enacted ERISA.

If left undisturbed, the decision below will have profound—and potentially devastating—consequences for defined benefit pension plans. The decision compels those plans funded on the actuarial assumption that a COLA provided to monthly annuitants is not a component of the participants' accrued benefit to begin providing the COLA to all participants and, through the operation of the anti-cutback rule, prohibits those plans from thereafter reducing the COLA's amount. As evidenced by recent congressional efforts to shore up the pension system, many defined benefit pension plans are already significantly underfunded. The imposition of this new and unforeseen liability will place additional financial burdens on these plans and their employer sponsors—to the substantial detriment of the millions of workers who rely on such plans to fund their retirements.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' INTERPRETATIONS OF THE TERM "ACCRUED BENEFIT" UNDER ERISA.

The Seventh Circuit's holding that a COLA is *per se* a component of the "accrued benefit" provided by a defined benefit pension plan—regardless of the terms of the plan itself—is directly at odds with decisions from the Fourth and Ninth Circuits utilizing a case-by-case approach that looks to a plan's terms to determine whether a COLA constitutes part of a participant's "accrued benefit."

A. In *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner*, 318 F.3d 599 (4th Cir. 2003), the Fourth Circuit held that a COLA did not constitute an "accrued benefit" for participants who retired before the COLA had been implemented because the terms of the plan in effect at the time of the participants' retirement did not provide for a COLA. *Id.* at 605. Construing the definition of "accrued benefit" in the Internal Revenue Code—which is substantively identical to ERISA's definition of "accrued benefit"—the court explained that the "definition does not purport to describe what counts as an 'accrued benefit' for *all* participants in *all* qualifying plans. Rather, the statutory definition is a signpost directing us to look to the terms of the plan at issue." *Id.* at 602-03 (citing I.R.C. § 411(a)(7)(A)(i)) (emphases added).[3] When

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[3] I.R.C. § 411(a)(7)(A)(i) provides that "the term 'accrued benefit' means . . . in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age." The Internal Revenue Code imposes a number of requirements that

the Internal Revenue Code "refers to 'accrued benefit,'" the court continued, "it refers to a benefit created by the accumulation of contributions and limited in its form of payment as '*determined under the plan*,' . . . but it does not describe what a given plan participant's accrued benefit would be. The statute leaves this level of detail to plan drafters." *Id.* at 603 (emphasis in original). Because the "plan drafters" had not provided for a COLA at the time that the relevant group of participants retired and "[t]he Plan . . . state[d] quite clearly that retirement benefits are determined by the terms in effect 'at the time the Participant separates' from service," the COLA that was implemented after the participants' retirement was not part of their accrued benefit and thus was not subject to the protection of the anti-cutback rule. *Id.* at 604. "[T]he security provided by" that rule, the court explained, "is bounded by the terms of the plan in that the plan defines the benefits promised." *Id.*

Similarly, in *San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994), the Ninth Circuit held that a COLA was

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mirror those in Title I of ERISA, which a plan must satisfy in order to qualify for favorable tax status, including tax deferral of participants' benefits until they actually receive distributions. *See also Musmeci v. Schwegmann Giant Super Mkts., Inc.*, 332 F.3d 339, 345 (5th Cir. 2003) ("the interconnection between ERISA and the IRC reflects an intent to use common terminology").

not a component of the plan participants' "accrued benefit" because, under the terms of the plan at issue, the COLA was promised for only a limited period of time. *Id.* at *4. The court explained that the "purpose underlying ERISA's protection of accrued benefits is protection of employee expectations." *Id.* Because the plan stated that "[n]o COLAs were to be provided beyond" the limited period set forth in the plan, the COLA was "not an accrued benefit under ERISA" and its elimination did not violate the anti-cutback rule. *Id.*

The Seventh Circuit's conclusion in the decision below that, if provided to any participant, a COLA is *always* part of every participant's "accrued benefit"—regardless of the terms of the plan—is directly at odds with the holdings of the Fourth and Ninth Circuits that a COLA cannot be categorically treated as an accrued benefit because "the statutory definition" of the term is merely "a signpost directing [courts] to look to the terms of the plan at issue." *Sheet Metal Workers*, 318 F.3d at 602-03; *see also San Diego AFL-CIO*, 1994 WL 198663, at *4. Unlike the Fourth and Ninth Circuits, which look to the language of a particular plan to determine on a case-by-case basis whether a COLA is part of a participant's "accrued benefit," the Seventh Circuit held that the "term 'accrued benefit' has a statutory meaning" that always encompasses a COLA and that "the parties cannot change" by varying the plan's language. Pet. App. 6a (internal quotation marks omitted).[4]

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[4] The Seventh Circuit asserted that *Sheet Metal Workers* is distinguishable because the case pertained to plan participants who had retired before the COLA was added to the plan. Pet. App. 7a. That observation does not alter the fact that the

Accordingly, if respondent had brought this suit in the Fourth or Ninth Circuits, those courts would have looked to the definition of "accrued benefit" under the terms of the Plan to determine whether the COLA provided to participants who select monthly annuity payments is a component of their "accrued benefit" and therefore must be provided to all participants. Because the Plan unambiguously excludes the COLA from its definition of "accrued benefit" (*see supra* pg. 6), those courts would have concluded that the COLA is not part of the participants' "accrued benefit" and need not be paid to participants who select a one-time lump-sum distribution of their benefits.

The conflicting interpretative approaches adopted by the Fourth and Ninth Circuits, on the one hand, and the Seventh Circuit, on the other, vastly complicate the task of employees attempting to plan for retirement and actuaries seeking to ensure that a pension plan is adequately funded to cover its liabilities. Indeed, "[o]ne of the principal goals of ERISA is to enable employers to establish a uniform adminis-

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Fourth Circuit reached the conclusion that the COLA was not a component of the "accrued benefit" of those participants who had retired before its implementation by "look[ing] to the terms of the plan at issue" and determining that the plan did not include a COLA in its definition of "accrued benefit." *Sheet Metal Workers*, 318 F.3d at 602-03. The Seventh Circuit, in contrast, expressly declined to "look to the terms of the plan" when deciding whether the COLA was a component of respondent's "accrued benefit" and instead applied a *per se* rule that any COLA offered to a monthly annuitant is a part of the "accrued benefit" of every plan participant.

trative scheme, which provides a set of standard procedures to guide . . . disbursement of benefits." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (internal quotation marks omitted). Such "[u]niformity is impossible, however, if plans are subject to different legal obligations in different States." *Id.* This Court's review is therefore warranted to provide much-needed clarity to employees, plan actuaries, and lower courts confronted with these irreconcilable interpretations of one of ERISA's most fundamental concepts.

B. The conflict between the Seventh Circuit's *per se* approach to determining whether a COLA is part of a participant's "accrued benefit" and the case-by-case examination undertaken by the Fourth and Ninth Circuits is part of a larger division among the circuits as to whether the terms of a plan are controlling when defining a participant's "accrued benefit."

In *Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516 (3d Cir. 1988), for example, the Third Circuit relied on a plan's terms to conclude that an early retirement benefit provided by the plan was a "retirement-type subsidy"—an amount in excess of "the actuarial equivalent of the normal retirement benefit"—rather than a component of the participants' accrued benefit. *Id.* at 1521 n.6, 1527. The court explained that "an employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive *under the terms of the plan* if employment ceased at that particular point in time" and that, under "the terms of the plan" at issue, the early retirement benefit was an amount in addition to—and separate from—the participants' accrued benefit. *Id.* at 1524 (emphasis added). The plaintiffs were therefore not entitled to receive that early retirement

benefit upon partial termination of the plan. *Id.* at 1528; *see also Hein v. FDIC*, 88 F.3d 210, 218 (3d Cir. 1996) ("we cannot read ERISA to change the terms of the Plan and vest [a participant] with a benefit for which he never qualified").

Moreover, in *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989), the Fourth Circuit held that it is permissible for the terms of an ERISA plan to provide participants who select monthly annuity payments with enhanced benefits—above and beyond their accrued benefit—that need not be provided to recipients who elect a lump-sum distribution. *Id.* at 1195. The plan in question offered several distribution options for individuals receiving early retirement benefits, including a lump-sum distribution and two different monthly annuity options, and calculated the actuarial equivalent of the normal retirement benefit differently for each option. *Id.* at 1183. The court rejected the claim advanced by a group of lump-sum recipients that ERISA entitled them to the higher rates of distribution used to calculate the monthly annuity payments. *Id.* at 1194-95. The court explained that the lower rate of distribution for the lump-sum payment was the actuarial equivalent of the normal retirement benefit and that participants who selected the monthly annuity options were receiving benefits in excess of their normal retirement benefit. *Id.* at 1193-94. "[U]nder the express terms of the Plan," lump-sum recipients were not entitled to this enhancement, and the court

"decline[d] to read into its provisions any such manifestly unintended rule." *Id.* at 1194.[5]

Similarly, in *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), the Ninth Circuit held that a "living pension" feature, which provided for the level of benefits to increase in conjunction with the salary of a participant's former job, was an accrued benefit that could not be decreased by the plan because it "primarily provide[d] retirement income." *Id.* at 1463. The court looked to the terms of the plan in reaching this conclusion, explaining that "the material available for interpreting ERISA's definition of 'accrual' always refers to the terms of the pension plan itself. It is those terms that raise the 'antici-

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[5] The Fourth Circuit's understanding that a lump-sum payment need not be actuarially identical to monthly payments in all situations is entirely consistent with IRS regulations. Indeed, the IRS has promulgated regulations mandating certain disclosures as to the various distribution options provided by a plan so that retirees can easily compare the value of those options. In the preamble to the regulations, the IRS specifically noted that a chief concern was disclosure to participants who must choose between "subsidized annuity distributions" and "unsubsidized single-sum distributions," because participants may be unaware of "the value of the subsidy that is foregone if the single-sum distribution is elected." TD Release No. 9256, *Revised Regulations Concerning Disclosure of Relative Values of Options Forms of Benefit*, 71 Fed. Reg. 14,798, 14,799 (Mar. 24, 2006). This regulation explicitly recognizes that the value of the benefits that a participant receives may be less if selecting a lump-sum payment than if selecting a monthly annuity. Thus, the Seventh Circuit's decision—which expressly rejects this possibility—is inconsistent not only with the Fourth Circuit's decision in *De Nobel*, but also with current Treasury Department regulations.

pat[ion of] retirement benefits' that Congress sought to protect and the 'promised . . . defined pension benefit' that the Supreme Court has sought to protect." *Id.* at 1465-66 (alterations in original).

The Seventh Circuit's conclusion that any benefit paid to a monthly annuitant is necessarily a component of every participant's accrued benefit—regardless of the terms of the plan itself—cannot be reconciled with these decisions in which the Third, Fourth, and Ninth Circuits have looked to the plan language to determine the scope of a participant's accrued benefit and authorized plans to provide monthly annuitants with benefit enhancements not made available to lump-sum recipients. *But see Esden v. Bank of Boston*, 229 F.3d 154, 172 (2d Cir. 2000) ("ERISA was enacted to restrict employers' and employees' freedom of contract when bargaining over pensions. Employers do not have to provide pension plans, but when they do, those plans must comply with Title I of ERISA.") (footnote omitted). This Court's review is required to resolve the conflict between these fundamentally inconsistent approaches to defining a plan participant's "accrued benefit" and "to ensure"—as Congress intended when it enacted ERISA—"that plans and plan sponsors [are] . . . subject to a uniform body of benefits law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (internal quotation marks omitted).

II. THE SEVENTH CIRCUIT'S *PER SE* APPROACH TO DEFINING "ACCRUED BENEFIT" IS INCONSISTENT WITH ERISA'S PLAIN LANGUAGE AND LEGISLATIVE OBJECTIVES.

The Seventh Circuit's conclusion that a COLA is always a component of a plan participant's accrued benefit—even if explicitly excluded from the definition of "accrued benefit" by the terms of the plan—is squarely at odds with the plain language of ERISA and Congress's intentions when enacting the statute.

ERISA does not require employers to establish pension benefit plans or to provide any specific level of benefits when such plans have been established. *Spink*, 517 U.S. at 887. It is therefore "private parties, not the Government, [who] control the level of benefits" provided by a pension plan through their control over the terms of the plan. *Alessi*, 451 U.S. at 511. ERISA simply safeguards participants' expectations by ensuring that they actually receive the benefits promised to them under a plan's terms. *Heinz*, 541 U.S. at 743.

Consistent with the congressional objectives that animate the statute, ERISA explicitly provides that a participant's accrued benefit is to be "determined under the plan" itself (29 U.S.C. § 1002(23)(A)), rather than pursuant to a statutorily prescribed formula. It is undisputed that the terms of the Rohm and Haas Pension Plan exclude the COLA from the definition of a participant's "accrued benefit." Pet. App. 4a; *see also id.* at 69a ("The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan . . . ."). The Seventh Circuit's conclusion that the COLA nevertheless constitutes part of every participant's "accrued benefit" therefore contradicts the plain statutory language of ERISA—

which directs courts to look to the plan's terms when defining a participant's "accrued benefit"—and is flatly inconsistent with ERISA's objective of "protecting employees' *justified* expectations of receiving the benefits their employers promise them." *Heinz*, 541 U.S. at 743 (emphasis added); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) ("the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue").

Indeed, the decision below rests on a fundamental misconception of the protections afforded by ERISA. Participants in the Plan who elected to receive their benefits in a single lump-sum distribution could not have reasonably expected to receive a COLA because the terms of the Plan expressly and repeatedly provide that a COLA is available *only* to participants who elect monthly annuity payments. *See, e.g.*, Pet. App. 59a. ERISA's objective of ensuring that plan participants receive the benefits promised to them under the terms of the plan therefore militates in favor of restricting payment of the COLA to participants who receive monthly annuity payments and denying a windfall COLA payment to lump-sum recipients. The Seventh Circuit's decision to unilaterally rewrite the Plan's terms improperly substitutes its own judgment for that of the Plan's drafters and compels defined benefit pension plans to shift a portion of their finite resources from paying annuitants their expected benefits to funding an unexpected and unwarranted COLA for lump-sum recipients. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) ("employers have large leeway to design disability and other welfare plans as they see fit").

The decision below similarly reflects a basic misreading of the statutory definition of "accrued benefit." ERISA specifies both how an accrued benefit is to be determined and how it is to be expressed. It is "*determined* under the plan" and it is "*expressed* in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A) (emphases added). The decision below eviscerates the first clause of the statutory definition by holding that any benefit that would be paid as part of a retiree's "annual benefit" is necessarily part of the "accrued benefit," even if expressly excluded from the definition of "accrued benefit" by the terms of the plan. Indeed, the decision on which the Seventh Circuit principally relied, *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Union*, 980 F.2d 465 (7th Cir. 1992), explicitly read the "determined under the plan language" out of the statutory definition, suggesting that an "accrued benefit is, 'in the case of a defined benefit plan, . . . an annual benefit commencing at normal retirement age.'" *Id.* at 468 (quoting 29 U.S.C. § 1002(23)(A)) (alteration in original). The Seventh Circuit perpetuated this erroneous statutory construction in the decision below.[6]

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[6] The Seventh Circuit also disregarded the fact that it is a condition precedent to the possibility of any COLA that the participant be a retiree who has already selected the monthly annuity. Because the COLA must follow the selection of the monthly annuity and is not paid until "March 31st subsequent to the year of retirement" (Pet. App. 59a), it cannot be part of the annuity "commencing at normal retirement age" and thus cannot be part of the "accrued benefit" under ERISA. 29 U.S.C. § 1002(23)(A). This conclusion is reinforced by the fact that, under the terms of the Plan, payment of the COLA may in some

Properly conceived, the Plan's COLA is a "retirement-type subsidy" paid to monthly annuitants—an amount in excess of "the actuarial equivalent of [their] normal retirement benefit" (*Ashenbaugh*, 854 F.2d at 1521 n.6)—rather than a component of a participant's accrued benefit, and it therefore need not be paid to participants who receive a lump-sum distribution of their benefits. *See* 29 U.S.C. § 1054(g)(1)-(2) (distinguishing between an accrued benefit and a retirement-type subsidy). Participants who select monthly annuity payments receive both their normal retirement benefit (a monthly payment calculated based on years of service and compensation) *and* the COLA, which is defined under the Plan as a benefit enhancement that is distinct from a participant's normal retirement benefit and that is paid at the discretion of the Plan. Pet. App. 59a, 69a. A participant who elects a lump-sum distribution, in contrast, receives the full "actuarial equivalent of the normal retirement benefit" paid to monthly annuitants, but is not entitled to the COLA because it is a separate and additional amount limited to a specific class of beneficiaries under the terms of the Plan.

This Court's review is warranted to correct the Seventh Circuit's erroneous interpretation of ERISA and to ensure that "private parties," not courts, have

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[Footnote continued from previous page]

cases commence *before* a participant reaches normal retirement age. Pet. App. 61a; *see also Am. Stores Co. v. Am. Stores Co. Retirement Plan*, 928 F.2d 986, 990 (10th Cir. 1991) (holding that unreduced early retirement benefits were not accrued benefits because they did not commence at normal retirement age).

the final word regarding "the level of benefits" provided by a plan. *Alessi*, 451 U.S. at 511.

III. The Decision Below Vastly Increases The Risk Of Plan Underfunding And Termination.

The Seventh Circuit's holding that a COLA is *per se* a component of the "accrued benefit" under a defined benefit pension plan—even when expressly excluded from the plan's definition of "accrued benefit"—upsets the settled funding expectations of plan sponsors and exposes plans to new and unforeseen liabilities that many plans (and their sponsors) may be unable to absorb. The inevitable result will be an intensification of the current pension crisis through widespread plan underfunding and potential plan terminations.

The conclusion that a plan feature constitutes an "accrued benefit" has significant financial implications for a plan. Not only must an accrued benefit be provided in an actuarially equivalent amount to participants who select a lump-sum distribution of benefits (29 U.S.C. § 1054(c)(3)), but plans are also prohibited by the anti-cutback rule from reducing the amount of an accrued benefit. *Id.* § 1054(g). Thus, when a court holds, as the Seventh Circuit did below, that a plan feature excluded from a plan's definition of "accrued benefit" nevertheless constitutes part of that benefit, the plan is required to provide that benefit to participants who elect lump-sum payments—even though they never expected to receive such a benefit—and is thereafter prohibited from reducing the amount of that benefit—whether or not the plan has adequate funds to finance this additional obligation. Many plans may be unable to sustain the imposition of such unexpected liability.

In the specific case of COLAs, for example, many plans funded on the actuarial assumption that the COLA they provide to monthly annuitants did not constitute part of the participants' accrued benefit may be unable to finance the cost of providing this additional benefit to lump-sum recipients. For those defined benefit pension plans that are already struggling—due to historically low interest rates, poor returns on investment, and other factors—to meet their financial obligations to participants, the requirement to begin providing a COLA to lump-sum recipients whenever they provide a COLA to monthly annuitants will move them one step closer to insolvency and potential termination. Such a result is directly at odds with ERISA's objective of "discourag[ing] plan terminations." *Nachman Corp.*, 446 U.S. at 382. At a minimum, plans will be less likely to provide *any* of their new participants with a COLA in order to avoid the obligation to pay the COLA to lump-sum recipients—to the substantial detriment of monthly annuitants, who may experience a significant diminution in the value of their benefits over time due to inflation.

The Nation's pension system is already widely acknowledged to be in a state of crisis. *See, e.g.*, Comm. on Educ. & Workforce, U.S. House of Representatives, Nation's Editorial Pages Highlight Pension Crisis (Dec. 1, 2005). Funding shortfalls have forced numerous companies—including IBM, Verizon, and Hewlett-Packard—to freeze benefits or terminate their plans altogether. *See, e.g.*, Ellen E. Schultz et al., *Tracking the Numbers / Outside Audit: Forecast: More Pension Freezes*, Wall St. J., Jan. 12, 2006, at C1. Indeed, the Pension Benefit Guaranty Corporation ("PBGC")—which "protect[s] employees against the loss of 'nonforfeitable' benefits upon ter-

mination of pension plans that lack sufficient funds" (*Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 7 (2004) (internal quotation marks omitted))—reported that in 2005, "1,108 plans covering 15 million workers and retirees had $787 billion in assets to cover over $1.14 trillion in liabilities, for an average funded ratio of 69 percent." Testimony of Bradley D. Belt, Executive Dir. PBGC, Before the Comm. on Budget, United States Senate, *at* http://www.pbgc.gov/media/news-archive/testimony/tm13070.html (last accessed Jan. 7, 2008). The rapid increase in plan terminations over the past few years left the PBGC with a multibillion-dollar deficit—even though it guarantees only a portion of a plan participant's benefits—and compelled Congress in 2006 to enact legislation to shore up the remaining defined benefit plans and avert an even more serious pension crisis. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780; *see also* Alison Grant, *Pension Safety Net Is Getting Tattered; Federal Agency Could Run Out of Money as Bankruptcies Mount*, Plain Dealer (Cleveland), July 2, 2006, at A1.

The Seventh Circuit's conclusion that, regardless of a plan's terms, COLAs and analogous benefit enhancements provided to only a subset of plan participants *always* constitute part of a participant's accrued benefit will exacerbate this chronic state of underfunding and accelerate the alarming rate of plan termination. This Court's review is warranted to ensure that—consistent with the statutory objectives of ERISA and the interests of millions of retirees dependent on their pension benefits—courts do not unilaterally rewrite the terms of defined benefit pension plans and require those plans to assume unforeseen pension obligations that participants never

expected to receive and that many plans may be unable to absorb.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 8, 2008

APPENDIX

APPENDIX A

Gary WILLIAMS, Plaintiff–Appellee,

v.

ROHM AND HAAS PENSION PLAN, Defendant–Appellant.

No. 06–2555.

United States Court of Appeals, Seventh Circuit.

Argued June 6, 2007.

Decided Aug. 14, 2007.

Rehearing and Rehearing En Banc Denied Oct. 10, 2007.*

James T. Malysiak, Lee A. Freeman, Jr. (argued), Jenner & Block, Chicago, IL, for Defendant–Appellant.

Linda M. Doyle, McDermott, Will & Emery, Chicago, IL, M. Miller Baker (argued), McDermott, Will & Emery, Washington, DC, for Plaintiff–Appellee.

Before RIPPLE, KANNE, and EVANS, Circuit Judges.

KANNE, Circuit Judge.

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* Judges Flaum and Rovner took no part in the consideration of this case.

Gary Williams filed suit, individually and on behalf of all others similarly situated, alleging that the Rohm and Haas Pension Plan (Plan) violated the Employee Retirement Income Security Act (ERISA) by failing to include a cost-of-living adjustment (COLA) in his lump sum distribution from the Plan. 29 U.S.C. § 1054(c)(3). The district court granted class certification and entered summary judgment for Williams. The district court concluded that the terms of the Plan violated ERISA because the COLA was an accrued benefit as ERISA defines that term. We agree, and therefore affirm the judgment of the district court.

I. BACKGROUND

The Plan is a defined benefit pension plan under § 3(35) of ERISA. 29 U.S.C. § 1002(35). Section 3.1 of the Plan defines "Accrued Benefit" as "that portion of a Participant's Basic Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date, that has accrued as of any determination date in accordance with Article VII." Article VII provides a formula to calculate the "Normal Retirement Pension" as a function of the participant's years of service and level of compensation. The accrued benefit, under the terms of the Plan, is thus the result of this formula, expressed in terms of a monthly single life annuity.

The Plan provides participants with a variety of payment options, as relevant here, either a one-time lump sum distribution or a monthly annuity payment. The Plan explains that the lump sum distribution is the actuarial equivalent of the accrued benefit, calculated using interest rates and mortality tables set by the Internal Revenue Code.

COLAs are commonly applied to annuities in order to account for inflation. With a COLA, an annuitant's payments will increase each year at a level commensurate with the calculated rate. The Plan calculates each year's COLA based upon the previous year's Consumer Price Index for Urban Wage Earners and Clerical Workers and limits each Participant's COLA to three percent of their annual benefit. The Plan describes the COLA as an "enhancement." While participants who choose to receive their pension payments as an annuity are automatically entitled to a COLA, those who choose a one-time lump sum payment do not qualify for the COLA enhancement.

Williams was employed by Rohm and Haas from 1969 until his termination in 1997. As a participant in the Plan, he was entitled to his accrued benefit under the Plan upon his termination. Williams chose to receive his pension in a one-time lump sum distribution of $47,850.71. Six years later, Williams filed a class action suit against Rohm and Haas alleging that he was wrongfully denied benefits under the Plan because his lump sum distribution did not include the present value of the COLA he would have received had he chosen to receive his pension in the form of monthly annuity payments. The district court dismissed the complaint because Williams had not exhausted his administrative remedies. Williams exhausted the administrative process, to no avail, and filed the instant case in 2004.

After granting class certification for former Plan participants who had received lump sum distributions without COLAs, the district court denied the Plan's motion for summary judgment and granted Williams's motion for summary judgment.

II. ANALYSIS

The issue before us is whether the Plan's COLA falls within ERISA's definition of "accrued benefit." If so, then the Plan violates ERISA by providing COLAs to participants who opt for annuity payments but denying COLAs to participants who opt for one-time lump sum distributions. 29 U.S.C. § 1054(c)(3). We review the district court's grant of summary judgment *de novo*, viewing all facts in the light most favorable to the non-moving party. *Sperandeo v. Lorillard Tobacco Co., Inc.*, 460 F.3d 866, 870 (7th Cir. 2006) (citing *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 631 (7th Cir. 2004)); *see also Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 357 (7th Cir. 2006) (noting that, notwithstanding discretion afforded a plan administrator, claims that the plan as interpreted violates ERISA are reviewed *de novo*). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

The parties agree that the plain terms of the Plan exclude the COLA from a participant's accrued benefit. Therefore, we need only decide whether this formulation complies with ERISA's requirements. ERISA and the Internal Revenue Code prescribe that if a defined benefit pension plan allows for a lump sum distribution, then that distribution must equal the present value of the accrued benefit expressed in the form of a single-life annuity. 29 U.S.C. § 1054(c)(3); 26 U.S.C. § 411(c)(3); 26 C.F.R. § 1.417(e)–1(d). We recognized this limitation in *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, where we stated: "ERISA requires that any lump-sum substitute for an accrued pension benefit be the

actuarial equivalent of that benefit." 338 F.3d 755, 759 (7th Cir. 2003) (citing 29 U.S.C. § 1054(c)(3); *May Dept. Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 600 (7th Cir. 2002); *Esden v. Bank of Boston*, 229 F.3d 154, 164, 173 (2d Cir. 2000)); *see also Call v. Ameritech Mgmt. Pension Plan*, 475 F.3d 816, 817 (7th Cir. 2007) ("When a participant in a defined-benefit pension plan is given a choice between taking pension benefits as an annuity or in a lump sum, the lump sum must be so calculated as to be the actuarial equivalent of the annuity.").

So, what is an "accrued benefit" under ERISA? The Plan urges us to interpret "accrued benefit" to mean whatever the particular plan document says it means. Indeed, it finds support for this interpretation in ERISA § 2(23)(A): "The term 'accrued benefit' means—. . . the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). ERISA itself directs us to look at the individual plan's terms in order to discern the accrued benefit. *See Bd. of Trs. of Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599, 602–03 (4th Cir. 2003). Under ERISA, "private parties, not the Government, control the level of benefits" provided to pension plan participants. *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 511, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

Williams acknowledges that we must look to the individual plan document to determine what the "accrued benefit" is in any given case, but argues that ERISA does not accept the document's definition. Rather, the "accrued benefit" is that benefit a participant would be entitled to if he chose to receive it in the form of a single-life annuity, thus, forcing par-

ity between annuity and lump sum distributions. In this case, the Plan considers the COLA to be an enhancement that is awarded to annuitants, over and above the accrued benefit. Under Williams's interpretation of ERISA, we simply ask: What would Williams get if he chose to receive his pension in annuity payments? The annuity, calculated based upon his years of service and compensation, plus the yearly COLA. That is the accrued benefit. Williams's lump-sum payment would then be the combined present value of the annuity and projected COLA.

We considered a very similar issue in *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992). In *Hickey*, a plan terminated without providing funding for future COLAs. We held that the COLA was part of the accrued benefit and, as such, its elimination violated ERISA's anti-cutback provision. *Id.* at 470; *see* 29 U.S.C. § 1054(g)(1). In reaching our decision, we distinguished accrued benefits from ancillary benefits. *Id.* at 468 (citing H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5054). Ancillary benefits are those that would be provided by a new employer, separate from any benefits provided by the current employer, such as health or life insurance. *Id.* (citing H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726). "In contrast, the COLA [is] inseparably tied to the monthly retirement benefit as a means for maintaining the real value of that benefit. It [cannot], therefore, be said to be ancillary to the benefit, and it would not be provided by a new employer." *Id.*

Accordingly, we stated that "[t]he term 'accrued benefit' has a statutory meaning, and the parties cannot change that meaning by simply labeling cer-

tain benefits as 'accrued benefits' and others, such as the COLA, as 'supplementary benefits.'" *Id.* at 468. But this is precisely what the Plan has attempted to do in this case. It seeks to disguise a penalty exacted against lump sum recipients as a bonus afforded to annuitants. In fact, it appears that the Plan attempted to write around ERISA's limits by explicitly excluding the COLA from lump sum distributions after learning of a district court case holding that a COLA is, *per se*, an accrued benefit under ERISA. *See Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189 (D. Mass. 2001).

The Plan argues that the district court's decision penalizes it for providing an enhanced benefit to annuitants, and that such a penalty is contrary to the purposes of ERISA. In support of this argument, the Plan relies primarily on the Fourth Circuit's opinion in *Sheet Metal Workers*, quoting: "[I]f trustees of ERISA plans knew that providing an additional benefit to already-retired employees for a given year would lock that benefit in as a floor for all future years, they would be less likely to increase benefits gratuitously in years when the plans were particularly flush." Appellant's Br. p. 24 (quoting 318 F.3d at 605). The key to the quoted passage is that the participants were "already retired." The COLA in that case was in no way "accrued" because it was not included in the plan during the term of the participants' employment. *Sheet Metal Workers*, 318 F.3d at 601. Employers are not required to provide pension benefits, but when they do, their plans must comply with ERISA, and the promises they make can in no way be considered mere gratuities. *See May Dept's Stores Co.*, 305 F.3d at 601.

The Plan cannot avoid that which is dictated by the terms of ERISA. While ERISA generally allows each plan to select the monetary amount of benefits provided, it remains a paternalistic regulation designed to restrict the freedom of contract. *Id. Hickey* held that a COLA applied to a defined benefit pension plan annuity is an accrued benefit under ERISA, and that holding is determinative in this case. The Plan, as administered, violates ERISA. 29 U.S.C. § 1054(c)(3). If a defined benefit pension plan entitles an annuitant to a COLA, it must also provide the COLA's actuarial equivalent to a participant who chooses instead to receive his pension in the form of a one-time lump sum distribution.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED; and this case is REMANDED to the district court for further proceedings, including calculating the value of the COLAs that were denied.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GARY WILLIAMS, Individually and on behalf of all others similarly situated, Plaintiffs,	)	
vs.	)	4:04-CV-0078-SEB-WGH
ROHM AND HAAS PENSION PLAN, Defendant.	)	

ENTRY DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Gary Williams ("Williams") filed suit, on behalf of himself and a class of similarly situated individuals (the "Class" or "Plaintiffs"), contending that the

Rohm and Haas Pension Plan[1] (the "Plan" or "Defendant") violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 et seq., by failing to include the value of a cost-of-living adjustment ("COLA") in his lump sum distribution from the Plan.[2]

This matter comes before the Court on the Plan's and Williams's cross motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.[3] For the reasons outlined below, we DENY Defendant's Motion for Summary Judgment

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[1] As a result of the merger of the Morton International, Inc. Pension Plan with and into the Rohm and Haas Pension Plan and the addition of a new benefit formula, the Rohm and Haas Pension Plan was amended and renamed effective April 1, 2001, as the Rohm and Haas Company Retirement Plan. Def. Mem. for Summ. J. at 4. The governing Plan document in effect at the time of Williams's distribution from the Plan in 1997, was referred to in Patricia Coyle's deposition as the "Legacy Plan," which was the Rohm and Haas Pension Plan, as amended and restated effective December 31, 1994. (AR00022-00110).

[2] On October 22, 2004, the Court certified a class of plaintiffs in these terms:

> "All former participants in the Rohm & Haas Pension Plan (the "Plan") who received a lump sum distribution from the Plan which did not take into account a cost of living adjustment in calculating the lump sum distribution."

Gary Williams was appointed Class Representative and his attorneys as class counsel.

[3] Williams filed his memo in support of summary judgment on behalf of the class on June 15, 2005; Defendant filed its motion for summary judgment also on June 15, 2005.

and GRANT Plaintiffs' Motion for Summary Judgment.

Introduction

A. *Summary of Defendant's Motion for Summary Judgment*

Defendant contends that both of the ERISA remedial provisions under which Williams's one-count complaint arises—Sections 502(a)(1)(B) and 502(a)(3)—suffer from procedural and substantive flaws, which bar Plaintiffs from securing relief under either of them. Def. Memo for S.J. at 1. First, Defendant claims that Williams's ERISA Section 502(a)(1)(B) claim must be reviewed under the deferential arbitrary and capricious standard. Under this standard, Defendant argues that the Rohm and Haas Benefits Administrative Committee's (the "BAC") decision to deny Williams's benefit claim must be upheld because it was reasonable based on the Plan's unambiguous terms. Second, Defendant contends that Williams's claim for equitable relief under Section 502(a)(3) should be dismissed for at least two reasons: (1) Williams cannot recover under Section 502(a)(3) because he has pled a claim for relief under Section 502(a)(1)(B) through which he seeks the same relief; and (2) Williams does not seek "other appropriate equitable relief" under ERISA because the benefits he seeks in his complaint constitutes an award of monetary damages.

B. *Summary of Plaintiffs' Motion for Summary Judgment*

Williams seeks summary judgment in favor of himself and the Class because: (1) the Plan included an automatic cost-of-living-adjustment ("COLA") as part of each participant's normal retirement benefit;

(2) the COLA is an "accrued benefit," as defined by ERISA § 3(23), 29 U.S.C. § 1002(23), and Internal Revenue Code § 411(a)(7), 26 U.S.C. § 411(a)(7); (3) the Plan failed to specify the value of the COLA in the Class members' lump-sum distributions; and (4) as a result, the Class members unintentionally forfeited a portion of their accrued benefit and received less than the full present value of their benefit, in violation of ERISA and the implementing Treasury Regulations.

FACTUAL BACKGROUND

A. Rohm and Haas Pension Plan

The Plan is a defined benefit pension plan within the meaning of Section 3(35) of ERISA, 29 U.S.C. § 1002(35). The Plan is sponsored by Rohm and Haas and was originally adopted to provide pension benefits for eligible employees of Rohm and Haas and its Affiliates in order to supplement retirement income benefits provided under the Social Security Act. (Complaint ¶ 2; AR 00159).[4] The Plan has at all times maintained its tax qualified status under the Internal Revenue Code. (AR00160).

Under the Plan, the Benefits Administrative Committee ("BAC") is the Plan Administrator as that term is defined under ERISA. See 29 U.S.C. § 1002(16)(A). The BAC has full responsibility to represent Participating Employers and Participants

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[4] References to "AR[No.]" are to the Administrative Record utilized to evaluate Williams's claim appeal for benefits under the Plan, Bates-stamped Nos. AR001-0337. The Administrative Record was authenticated by Patricia Coyle in her January 26, 2005 deposition.

in all things it may deem necessary for the Plan's proper administration, and, subject to the Plan's terms, the BAC's interpretation and administration of the Plan is conclusive. (AR00204). Under Section 15.3 of the Plan, the BAC's responsibilities include (but are not limited to): (i) verifying all procedures by which payments to Participants and Beneficiaries are authorized; (ii) interpreting Plan provisions in all particulars; and (iii) reviewing and answering any denied claim for benefits that has been appealed to the BAC under the Plan's claims procedures. (AR00204-205).

Under the Plan's claims procedures, in the case of an adverse benefit determination, the claimant or his representative has the opportunity to appeal a denied benefit claim to the BAC for review by requesting such review in writing within sixty days of receipt of notification of the denial. In reviewing a claim appeal, the BAC considers all comments, documents, records, and other information submitted by the claimant or his representative relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination. (AR00206-207, 228-229). The BAC reviews the claim appeal, the claim appeal summary, and other documents and information relevant to the claim, and votes to approve or deny the claim. The BAC members' votes are then sent to the BAC's Secretary to be tallied, and a formal claim appeal response is prepared by the BAC's Secretary for transmittal to the claimant. (Coyle Dep. at 16-17).

B. Plan's Definition of "Accrued Benefit" and "Normal Retirement Pension"

Section 3.1 of the Plan defines "Accrued Benefit" to mean "that portion of a Participant's Basic

Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date, that has accrued as of any determination date in accordance with Article VII." (AR00033).

Under Article VII, a Participant's "Normal Retirement Pension" is calculated pursuant to a set formula, which multiplies a specific dollar amount (either a percentage of the Participant's compensation or a set dollar amount) by the Participant's years of Benefit Service accumulated at the time of retirement, subject to certain limitations. The Participant's Accrued Benefit is then expressed to the Participant in terms of a monthly single life annuity as of the Participant's retirement date under Article VII. (AR00052-57).

The Plan provides that a Participant may have his or her Normal Retirement Pension distributed in a variety of payment forms, from monthly annuity payments to a one-time lump sum payment at the time of retirement. (AR00063-70). Article X of the Plan requires the BAC to furnish each Participant or terminated Participant with a general description of all payment options available, including a general explanation of the relative financial effect on a Participant's benefits of any of the available distribution forms. This description typically includes the amounts available under each option, which would be actuarially equivalent to the Participant's Accrued Benefit determined at the time of his retirement. (AR00063-64). Under Section 12.1.4 of the Plan, a Participant may elect to receive a one-time lump sum distribution of the Actuarial Equivalent present value of his Accrued Benefit, as determined under Appendix D to the Plan. (AR00068).

The Plan defines "Actuarial Equivalent" to mean "a benefit of equivalent actuarial value to the benefit that would otherwise have been provided to the Employee, determined on the basis of appropriate actuarial assumptions and methods set forth in Appendices A through D attached hereto." (AR00033). For purposes of determining the Actuarial Equivalent lump sum present value of a Participant's Normal Retirement Pension, Appendix D to the Plan sets forth the actuarial assumptions, which are limited to applicable interest rates and mortality tables to be used to determine the present value of a Participant's Normal Retirement Pension under the Plan, which are set by the Internal Revenue Code. COLA adjustments are not mentioned or specifically provided for in Appendix D to the Plan. (AR00105-107).

C. Plan's Provisions Do Not Allow for COLAs on Lump Sum Distributions

Article XV of the Plan sets forth the rules governing the payment of a COLA enhancement to a Participant. Specifically, Section 15.1 of the Plan states that a COLA enhancement may be paid only to Participants receiving monthly benefit payments—not to Participants who elect to receive a lump sum payout: "Except as provided in Sections 15.3 and 15.4, beginning with pension payments in March, 1974 . . . any Participant or Beneficiary of an eligible Participant (or a Participant who would have been eligible except for age), who is receiving monthly payments, shall be entitled to an annual Cost-of-Living Adjustment as described below. . . ." (AR00078; emphasis supplied).

Section 12.5 of the Plan also references the application of COLA enhancements, providing that "the Cost-of-Living Adjustment to pensions described in

Article XV, shall apply only to the monthly payments to" a contingent annuitant or Beneficiary who survives a retired Participant. (AR00070).

The Plan's summary plan description ("SPD") states:

> *What is a "COLA" and am I eligible to receive it?*
>
> The cost of living adjustment or "COLA" is an annual adjustment to monthly payments from the Plan intended to keep pace with inflation. The amount of the annual increase is based on the increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the previous year but is limited to no more than 3% of your annual benefit in any year. (AR00290).
>
> The COLA only applies to monthly payments; it does NOT apply if you receive your benefit in the form of a cash lump sum. The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law. The Plan may, at its discretion, eliminate the COLA at any time, regardless of whether it has made COLA payments in the past. (AR00290, emphasis added).

D. The BAC Denied Williams's Claim Appeal for Benefits Under the Plan

Williams was employed by Rohm and Haas from December 1, 1969 through March 31, 1997, when his employment was terminated for violating Rohm and Haas' Harassment Prevention and Correction Policy. (AR00004, 49). On March 31, 1997, Williams elected to receive his Normal Retirement Pension under the

Plan in the form of a one-time lump sum payment under Plan Section 12.1.4. Williams received as a lump sum payment—$47,850.71—his Accrued Benefit under the Plan on May 30, 1997. (AR00001). Six years thereafter, or about March 2003, Williams filed this class action complaint alleging that he was wrongfully denied benefits under the Plan because his lump sum payment did not include the value of the COLA he would have received had he elected to receive his benefits monthly under an annuity distribution option. (AR00018). On September 26, 2003, we granted the Plan's motion to dismiss Williams's class action complaint because Williams had failed to exhaust his available administrative remedies under the Plan. (*Williams v. Rohm and Haas Pension Plan*, No. NA-02-C-123, 2003 U.S. Dist. LEXIS 17313 (S.D. Ind. Sept. 26, 2003)).

On October 21, 2003, Williams, through his counsel, sent his administrative claim for benefits not to the BAC directly, but to the Plan's litigation counsel, arguing that the COLA enhancement added to monthly payments under the Plan is an accrued benefit and therefore part of his normal retirement benefit under the Plan. Williams claimed that if his lump sum distribution had included the value of the COLA, his distribution amount would have been larger than what he had received, prompting this request that he be paid the additional benefits equal to the value of the COLA. (AR00009-16).

On February 2, 2004, Williams, again through his counsel, submitted a claim appeal in which he incorporated all of the arguments raised and documents submitted in his initial benefits claim. (AR00008). The BAC, through its Secretary Patricia Coyle ("Coyle"), received and processed the claim appeal in the standard fashion, which included her re-

view and research as well as that of others on Rohm and Haas' benefits staff. (Coyle Dep. at 17, 131-133).

On April 1, 2004, Coyle, on the BAC's behalf, sent Williams's counsel a letter, notifying him that Williams's claim appeal had been denied by the BAC. In this letter, Coyle set forth the applicable Plan provisions on which the denial was based and explained the bases for the BAC's decision. (AR000001-2). Williams filed the instant lawsuit on April 2, 2004. (Compl. at 1).

LEGAL ANALYSIS

I. Standard of Review

Benefit determinations in ERISA cases, pursuant to 29 U.S.C. § 1132(a)(1)(B), are reviewed by the court *de novo*, unless the plan administrator has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the plan vests discretionary authority in the plan administrator, the standard of judicial review is based on an "arbitrary and capricious" analysis.[5] *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144,

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[5] The Seventh Circuit has held that the arbitrary and capricious standard is highly deferential to a plan administrator. Under the arbitrary and capricious standard, the BAC's decision to deny Williams's benefits claim appeal should be overturned only if it is "downright unreasonable" and not merely incorrect. *Tegtmeier v. Midwest Operating Engineers Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004). It is not the Court's function to decide whether it would reach the same conclusion as the Plan or even rely on the same authority. *Id.* If the Court determines that the BAC made an informed judgment and articulated an explanation for its decision that is satisfactory in light of the relevant plan's terms, the BAC's decision is

1147 (7th Cir. 1998); *see also Morgan v. Cigna Group Ins.*, 2003 WL 722804, *6 (S.D. Ind. 2003) (Barker, J.). However, the courts do not defer to the plan administrator's interpretation of a federal statute. *See, e.g., McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1108 (9th Cir. 2000). In a case where the claim against the plan is not that the terms of the plan were wrongly decided or construed, but that the plan itself is contrary to ERISA, then the decisions of a plan administrator will be reviewed *de novo*, as those decisions involve pure questions of law and the interpretation of the plan is not in dispute. *See Williams v. Midwest Operating Engineers Welfare Fund*, 125 F.3d 1138, 1140 (7th Cir. 1997).

In this case, the Plaintiffs' claim against the plan is not that the terms of the plan were wrongly decided or construed, but that the plan itself is contrary to ERISA. In his claim appeal, Williams admitted that he was ineligible to receive a COLA under the Plan's terms. See AR00009. Instead, he argues that the Plan's terms violate ERISA and the Internal Revenue Code. See AR00009-15. We review *de novo* the issue of ERISA's legal requirements.[6]

[Footnote continued from previous page]

deemed final and should not be disturbed. *See Exbom v. Cen. States, S.E. & S.W. Areas Health & Welfare Fund*, 900 F.2d 1138, 1143 (7th Cir. 1990). The Court does not ask whether it, a jury or a different plan administrator would have granted the benefits; questions of judgment or choices between competing reasonable outcomes are left to the plan administrator. *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 505 n.3 (7th Cir. 1995).

[6] If the issue were simply whether the Plan's definition of "Accrued Benefit" includes a COLA enhancement then Defendant would be correct that the appropriate standard of review

III. Does ERISA Provide a Remedy through which Plaintiffs May Seek to Recover for the Violation Alleged in the Complaint?

Williams has identified two, separate remedial provisions under which his ERISA claim purportedly arises; (1) under ERISA Section 502(a)(1)(B)–he seeks to recover benefits allegedly wrongfully denied him under the terms of the Plan; and (2) under ERISA, Section 502(a)(3)–he and the Class seek recovery of their Plan benefits through a declaration from the Court that BAC's decision to deny this claim appeal for benefits was wrongfully decided under applicable law. Defendant asserts that Williams's claim suffers from both procedural and substantive flaws, which bar relief under either remedial provision. Def. Memo for S.J. at 1.

A. Williams's Wrongful Denial of Benefits Claim under ERISA Section 502(a)(1)(B)

Section 502(a)(1)(B) permits participants or beneficiaries to bring a civil action: (1) to recover benefits due under the terms of his plan; (2) to enforce rights under the terms of the plan; or (3) to clarify rights to future benefits under the terms of the plan. See 29 U.S.C. § 1132(a)(1)(B). In *May Dept. Stores v. Federal Ins. Co.*, 305 F.3d 597 (7th

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[Footnote continued from previous page]

would involve the deferential arbitrary and capricious standard in our considering whether the BAC's interpretation of the Plan's terms was reasonable. See Def. Response at 7. It is undisputed that the BAC is granted sufficient discretionary authority to determine eligibility for benefits and to construe the terms of the plan.

Cir. 2002) (Posner, J.), the pension plan was sued under ERISA § 502(a)(3) for calculating lump sum distributions as amounts less than the present value of the normal annuity (albeit in accordance with the plan terms). On appeal of a subsequent coverage case between the plan and plan sponsor, and the E&O carrier, the plaintiffs (May and the plan) argued that because the employees' claims against their employers were not based on the language of the plan but provisions of ERISA, the claims were not for "benefits." 305 F.3d at 601. The Seventh Circuit disagreed. Judge Posner explained:

> The benefits sought were plan benefits; the question was how to compute them. The answer was given by ERISA, but that is just to say that, like many other contracts, pension plans governed by ERISA contain provisions implied by law.

Id.

Defendant states that Williams cannot recover under Section 502(a)(1)(B) because: (1) it is undisputed that Williams's claim for increased benefits through inclusion of the COLA enhancement's future value in his lump sum payment is not permitted under the Plan's unambiguous terms; (2) that Williams does not seek to enforce any rights under the Plan's terms—rather, he seeks to recover additional benefits; and (3) that Williams cannot argue that he seeks to clarify his rights to future benefits under the Plan, as he received a lump sum payment of all of his Accrued Benefits under the Plan in 1997. Therefore, Defendant argues, Williams is not entitled to any relief under Section 502(a)(1)(B) by the express terms of that ERISA remedial provision.

The reasoning in *May Dept. Stores v. Federal Ins. Co.*, 305 F.3d 597 (7th Cir. 2002), provides guidance and leads to a conclusion different from that asserted by the Defendant. Following *May*, it can fairly be said that Williams seeks to recover benefits wrongfully denied by the Plan. Here, as in *May*, when determining how the Plan's benefits are to be computed, the answer arises from the terms and provisions of ERISA. The Plan, which is governed by ERISA, incorporates provisions implied by law. So, even if the Plan's unambiguous (and allegedly unlawful) terms prohibit the inclusion of a COLA in a lump sum payment, that requirement may nonetheless be implied by ERISA and entitle Williams to such a benefit. Thus, Williams's effort is to recover "benefits due to him under the terms of his plan," even though those benefits are implied by ERISA, which law governs the Plan and is legally permissible.

B. Williams's Equitable Relief Claim under ERISA Section 502(a)(3)

Williams also brings his claims under Section 502(a)(3) seeking a "declaration" that the Plan violated ERISA. Defendant contends that Williams's claim for equitable relief under Section 502(a)(3) should be dismissed for at least two reasons: (1) Williams cannot recover under Section 502(a)(3) because he has plead a separate claim for relief under Section 502(a)(1)(B) through which he seeks the same relief; and (2) Williams does not seek "other appropriate equitable relief" under ERISA because the benefits he seeks in his complaint in fact constitute a request for monetary damages. Section 502(a)(3) of ERISA provides that:

> a civil action may be brought—by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

See 29 U.S.C. §1132(a)(3).

In *Varity Corp. v. Howe*, 516 U.S. 489 (1996) the Supreme Court of the United States, addressing proper claims under Section 502(a)(3), held that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief would normally not be 'appropriate.'" 516 U.S. at 515. "In short, *Varity* does not force a plaintiff to elect his remedy before filing a complaint, but rather prohibits a plaintiff from receiving equitable relief under ERISA § 502(a)(3) in addition to some other form of relief. *Varity*, 516 U.S. at 515." *Laurenzano*, 134 F. Supp. 2d at 194-195. Thus, Williams is not foreclosed from seeking equitable relief under ERISA Section 502(a)(3), simply because he has also pled a claim for relief under Section 502(a)(1)(B).

A year after *May* was decided, the Seventh Circuit had occasion to examine the interplay between ERISA §§ 502(a)(1)(B) and 502(a)(3) in *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 763 (7th Cir. 2003) (Posner, J.). There, citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Plan argued that the case could not be certified under Federal Rule of Civil Procedure 23(b)(2), because plaintiffs were not seeking injunctive or declaratory relief, "but really just damages

equal to the difference between the lump sums to which ERISA entitled the members of the class and the smaller lump sums they actually received." 338 F.3d at 763. Although plaintiffs cast their case in terms of Section 502(a)(3), Judge Posner cited 502(a)(1)(B) and stated that the suit "is by plan participants suing 'to recover benefits.'" *Berger*, 338 F.3d at 763. The Court wrote:

> What is sought is a declaration that [Defendant's] method of computing lump sums to which withdrawing employees are entitled is unlawful. That is a ground common to all the members of the class. True, the declaration sought and obtained was merely a prelude to a request for damages (incorrectly described by the plaintiffs as a request for restitutionary relief equitable in nature - the monetary relief sought is not restitutionary, and if it were it would not be equitable, *Great West Life & Annuity Ins. Co. v. Knudson*, *supra*, 534 U.S. at 213-14; [citation omitted]). But a declaratory judgment is *normally* a prelude to a request for other relief, whether injunctive or monetary; so there is nothing suspicious about the characterization of the suit as one for declaratory relief. The hope that motivates casting a request for relief in declaratory terms is that if the declaration is granted, the parties will be able to negotiate the concrete relief necessary to make the plaintiffs whole without further judicial proceedings. No one wants an empty declaration.

Id. at 763-64 (emphasis in original). Therefore, a "declaration" that the Plan violates ERISA may con-

stitute "other appropriate equitable relief," and is a permissible cause of action.

We agree with Plaintiffs, that in the wake of *May* and *Berger*, it appears that the appropriate method to address a pension plan whose terms violate ERISA is for the plaintiff to seek a declaration, pursuant to ERISA § 502(a)(3), that the plan's terms are indeed illegal (for example, because the plan's lump sum distribution provisions result in lump sums smaller than the present value of the normal retirement benefit). At that point, the law implies that the Plan's provisions include such a requirement and benefits are payable pursuant to ERISA § 502(a)(1)(B). Accordingly, we DENY Defendant's Motion for Summary Judgment on Williams's ERISA claim.

IV. Does the Plan comply with ERISA and, if not, were Williams and the Class injured in not receiving the full value of their Accrued Benefit with their lump sum distribution?

Williams alleges that the Plan violated certain sections of ERISA and the Internal Revenue Code by failing to calculate in his and the class's lump sum distributions the value of the COLA enhancement available under the Plan only to those receiving monthly payments of their Accrued Benefit. Specifically, Williams argues that the Plan's definition of "Accrued Benefits" does not satisfy ERISA's definition of that term because the COLA enhancement was not included when calculating the value of his lump sum distribution. The central issue in this litigation is whether the Plan's COLA enhancement, available to those Participants electing a monthly payment option, is an Accrued Benefit under ERISA

and thus also available to Participants who elected the lump sum payment.

ERISA and the Internal Revenue Code mandate that if a defined benefit pension plan provides for a form of payment other than a life annuity beginning at normal retirement age (the "normal retirement benefit"), then this optional form must be the actuarial equivalent of the annuity. Treasury Regulation 1-417(e)-d, 26 C.F.R. §1.417(e)-1d;[7] 29 U.S.C. 1054(c)(3); 26 U.S.C. 411(c)(3). The Seventh Circuit in *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 759 (7th Cir. 2003) (Posner, J.), recently confirmed that the ERISA statutory requirements (as implemented by the Treasury regulations) must be used for valuing a lump sum payment, stating, "ERISA requires that any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit." citing 29 U.S.C. § 1054(c)(3); *May Dep't Stores Co. v. Federal Ins. Co.*, 305 F.3d

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[7] Treasury Regulation 1.417(e)-1(d) states:

> A defined benefit plan must provide that the present value of any accrued benefit and the amount (subject to sections 411(c)(3) and 415) of any distribution, including a single sum, must not be less than the amount calculated using the applicable interest rate described in paragraph (d)(3) of this section (determined for the month described in paragraph (d)(4) of this section) and the applicable mortality table described in paragraph (d)(2) of this section. The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with the preceding sentence. 26 C.F.R. § 1.417(e)-1(d)(1) (emphasis added).

597, 600 (7th Cir. 2002); *Esden v. Bank of Boston*, 229 F.3d 154, 164, 173 (2d Cir. 2000).

ERISA: "Accrued Benefit" and the "Normal Retirement Benefit"

ERISA Section 2(23) defines the term "accrued benefit," in the case of a defined benefit plan, as "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). "It should be apparent that this definition does not purport to describe what counts as an 'accrued benefit' for all participants in all qualifying plans. Rather, the statutory definition is a signpost directing [courts] to look at the terms of the plan at issue." *Board of Trustees of the Sheet Metal Workers' Nat'l Pension Fund v. Comm. of Internal Rev.*, 318 F.3d 599, 602-03 (4th Cir. 2003). The Supreme Court has held that "private parties, not the Government, control the level of benefits" provided in ERISA pension plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). The Seventh Circuit evaluated a similar issue involving an "accrued benefit" in *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir. 1992); in that case, the Seventh Circuit stated:

> The term "accrued benefit" has a statutory meaning, and the parties cannot change that meaning by simply labeling certain benefits as "accrued benefits" and others, such as the COLA, as "supplementary benefits." An accrued benefit is, "in the case of a defined benefit plan, . . . an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23) (1984). We first determine what Congress meant by this definition, and

> then examine the Plan, as a whole, to determine which benefits created by the Plan fall within that definition.

"Accrued" benefits refers to those normal retirement benefits that an employee has earned at any given time during the course of employment. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 635 (7th Cir. 2004). Put another way, "[a]n employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time." *Ashenbaugh v. Crucible Inc.*, 854 F.2d 1516, 1524 (3d Cir. 1988)).

In conducting this analysis, it is also appropriate to consider the views of the agencies responsible for enforcing ERISA; to do otherwise would be to "embark upon a voyage without a compass." *Kohl v. Assoc. of Trial Lawyers of America*, 183 F.R.D. 475, 482 (D. Md. 1998) (quoting *Mead Corp. v. B.E. Tilley*, 490 U.S. 714, 726 (1989) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). The Internal Revenue Code and its supporting regulations expressly exclude from the definition of "accrued benefit" the value of an early retirement subsidy or any subsidized value in a joint and survivor annuity. *See* 29 U.S.C. § 411(a)(7); 29 C.F.R. § 1.411(a)-7(a)(ii). While to date no definition of "retirement-type subsidy" is contained in ERISA, the regulations and the legislative history of ERISA § 204(g)(2) define a benefit subsidy as "the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit." S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574. The legislative history further provides that a retirement-type subsidy is a subsidy that continues

after retirement. S. Rep. No. 575, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

Question 39 from the "Gray Book"[8] of the March 1994 Enrolled Actuaries Meeting asks:

> A plan provides for lump sum distributions based on actuarial equivalent interest rates equal to the PBGC interest rates on lump sums in plan terminations (i.e., the 417(e) rates). The plan also provides for annual post-retirement cost-of-living increases based on the National Cost-of-Living index, but not to exceed 3% in any year. The plan states that for lump sum determination, it is assumed that there would be no increase in the COL index.
>
> RESPONSE
>
> Subject to section 415 (discussed below), an automatic cost-of-living provision is an integral part of the participant's accrued benefit and, therefore, must be taken into account when determining amounts payable under optional forms of benefit. The assumption that there will be no increase in the COL index in determining the lump sum would not be reasonable and, therefore, would result in

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[8] The Enrolled Actuaries Report published by the American Academy of Actuaries in the summer of 2004 states that "[t]he Gray Book is a compilation of IRS responses to questions from pension practitioners regarding unusual situations or areas in which the Internal Revenue Code and regulations are unclear, insufficiently specific, contradictory, or silent." Vol. 29, No. 2 at p. 5.

> the impermissible - forfeiture of accrued benefits under section 411.

AR000 13.

Our research discloses that two courts have considered issues similar to the one presented here, in each case holding that employees were entitled to larger lump-sums because the plans excluded the value of the COLAs. *See Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189, 199-204 (D. Mass. 2001) (Young, C.J.); and *Kohl v. ATLA Pension Plan*, 183 F.R.D. 475 (D. Md. 1998) (Williams, J.). The courts in both *Laurenzano* and *Kohl*, discussed below, primarily and specifically relied on the Seventh Circuit holding in *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992); *See*, *Laurenzano*, 134 F. Supp. 2d at 199, and *Kohl*, 183 F.R.D. at 479.

In *Hickey*, the Seventh Circuit affirmed the trial court's ruling which granted partial summary judgment in favor of the plaintiff employees ruling that the COLA prescribed by the employer's Plan was an accrued benefit and, therefore, its elimination was a decrease of the accrued benefit in violation of ERISA. The Seventh Circuit opinion concluded:

> A participant's right to have his basic benefit adjusted for changes in the cost-of-living accrued each year along with the right to the basic benefit. A participant's entitlement to his or her normal retirement benefit included, as one component, the right to have the benefits adjusted pursuant to the COLA provision.

980 F.2d at 469. See also Treasury Regulation 1.417(a)-7 (defining accrued benefit as an annual

benefit commencing at normal retirement age). In *Hickey*, the Plan had been amended to add a COLA to all retirement benefits. The court noticed that the COLA adjusted the computed benefit rather than providing a separate optional benefit. "A participant's right to have his basic benefit adjusted for changes in the cost-of-living accrued each year along with the right to the basic benefit. A participant's entitlement to his or her normal retirement benefit included, as one component, the right to have the benefits adjusted pursuant to the COLA provision." *Id.* at 469.

In reaching its conclusion in *Hickey*, the Seventh Circuit examined the legislative history which informed the term, "accrued benefit," concluding:

> The 'primary function' of accrued benefits is to 'provide retirement income.' As such, accrued benefits do not encompass such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age when he is entitled to receive current social security benefits. . . .

Hickey, 980 F.3d at 467 (quoting H.R. Rep. N. 93-807, 93rd Cong. 2d Sess. 60 (1974), *reprinted in* II Legislative History at 3180). "The COLA is an accrued benefit: its primary purpose is to provide retirement income, it commences only at retirement, and it is not a benefit generally transferable to succeeding employers." *Id.*

Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust, 134 F.

Supp. 2d 189 (D. Mass. 2001) is a case very similar to the one presently before us. In *Laurenzano*, upon separation of his employment, rather than receive a life annuity, Laurenzano elected to receive a lump sum distribution, which did not include the present value of projected COLA payments. The district court held, "If a defined benefit pension plan normally provides retirement benefits in the form of a life annuity that includes a cost-of-living adjustment ("COLA")," a lump sum distribution in lieu of the annuity must include the present value of the projected COLA payments. *Laurenzano*, 134 F. Supp. 2d at 191 (noting that Section 5.7 of the plan at issue adds a COLA to certain Accrued Benefits while excluding the COLA from lump sum distributions. *Id.* at 192). In *Laurenzano*, the district court held that the plan provided only one definition of accrued benefit, but it was not consonant with the legal definition of "accrued benefit." Under the plan, the "annual benefit commencing at normal retirement age" was an annuity with COLA payments. Given the reality of the plan, as opposed to its legally-meaningless terminology, the "accrued benefit" under the plan included COLA payments. *Laurenzano*, F. Supp. 2d at 200-201. Initially, the plan terms in *Laurenzano* did not clearly exclude the COLA from the plan's accrued benefit definition:

> A Participant's "Pre-1995 Accrued Benefit" shall be subject to an annual [COLA] as of each January 1, beginning the January 1 next following the date benefit payments commence. . . . For purposes of this Section 5.7, a Participant's "Pre-1995 Accrued Benefit" is any portion of the benefit payable to the Participant under the Plan (other than a lump sum benefit) that is attributable to

> such Participant's Accrued Benefit determined as of December 31, 1994 on the basis of the Participant's Final Average Compensation and Credited Service determined as of December 31, 1994.

134 F. Supp. 2d at 192. In *Laurenzano*, the plan's exclusion of the COLA for lump sum distributions was placed in a parenthetical at the end of the plan provision adding the COLA enhancement. In addition, the COLA was discussed in the same plan provision that defined the accrued benefit under the plan.

In *Kohl v. Association of Trial Lawyers of America*, 183 F.R.D. 475 (D. Md. 1998), a pension plan participant brought a class action alleging that the plan administrator violated ERISA by failing to include a COLA when making a lump-sum payment. On cross-motions for summary judgment, the district court held that participants receiving retirement benefits in lump-sum payment were entitled to COLA. In *Kohl*, the court treated the issue as a matter of contract interpretation, determining whether, under the Plan's language, a COLA applied to a lump sum payment or not. The Court noted that under Section 1054 a participant's accrued benefits must be the actuarial equivalent of what her normal retirement benefits would have been when computed under the plan. However, by its own terms, the Plan required the lump sum cash option to be equal to the Value of the 10-year annuity option. *Id.* at 482.

While we have found no case directly on point, our review of circuit court opinions reveals that most courts have construed a COLA as an accrued benefit. *Hickey*, *supra*; *Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plans*, 750

F.2d 1458, 1463 (9th Cir. 1995) ("living pension" which increased age 65 benefit every year is an "accrued benefit"), *cert. denied*, 471 U.S. 1137 (1985); and *Schaefer v. Arkansas Medical Soc.*, 853 F.2d 1487, 1488 (8th Cir. 1988) (affirming unpublished district court decision holding that COLA is an "accrued pension benefit"); *see also, Board of Trustees of Sheet Metal Workers' Natl. Pension Fund v. C.I.R.*, 318 F.3d 599, 605 n.2 (4th Cir. 2003) (COLA granted after employment terminated is not an accrued benefit, distinguishing *Hickey* and *Shaw* because COLA benefits there were earned during period of employment).[9]

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[9] Defendants argue that other federal courts have held that a COLA enhancement does not qualify as an accrued benefit under the relevant plan documents. Defendants cite *Bd. of Trustees of the Sheet Metal Workers' Nat'l Pens. Fund v. Comm. of Internal Rev.*, 318 F.3d 599, 604 (4th Cir. 2003) and *San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union*, No. 93-55108, 1994 U.S. App. LEXIS 13167, * 13-14 (9th Cir. May 19, 1994). In both cases, COLA enhancements were not part of a participant's accrued benefit because the COLAS were not earned as a result of service, but instead were discretionarily granted after a participant's service had concluded and were expressly limited in duration as opposed to for the duration of the participant's post-retirement life. *LaBrosse v. Trustees of the Asbestos Workers Local 47 Ret. Trust Plan*, 186 F. Supp. 2d 791, 796 (W.D. Mich. 2001), deals with increases to dollar amounts used in calculating monthly retirement benefits (from $3 in 1956 to $45 in 1998). *Id.* at 793. The plan document did not guarantee any future increases, and the decisions to provide increases were discretionary. Thus, the Court held that because no obligation ever existed to provide further increases, and (unlike future COLA increases) the retirees had not accrued the right to those increases prior to retirement, the retirees' accrued benefits were not cut-back by a post-

The Defendant Plan cannot contest that some courts have previously found a promised COLA to be an accrued benefit under the plans at issue in those cases. However, Defendant argues that no such COLA benefits were promised under this Plan. Under the Plan's unambiguous terms, Defendant contends, the COLA enhancement available to Participants receiving a monthly payments of their retirement benefits does not qualify as an Accrued Benefit, and the BAC's decision to deny Williams's benefit claim does not violate ERISA. Therefore, the Court should grant the Plan judgment as a matter of law on Williams's class action complaint. Def. Memo in Supp. Of S.J. at 32 - 33.

Defendant seeks to distinguish each of the cases that hold that a COLA is an accrued benefit. In *Hickey*, the Plan at issue specifically provided that the COLA, which was added by amendment, was applicable to all retirement benefits. 980 F.2d at 466-67. In *Kohl*, the Court held that the terms of the plan document at issue control whether a COLA enhancement qualifies as an accrued benefit and determined that the plan document at issue was "unclear as to whether a COLA applie[d] to a lump sum payment or not." 183 F.R.D. at 480. Regarding *Laurenzano*, the Defendant argues that it is inapplicable because it incorrectly applies the definition of accrued benefit under ERISA. Def. Mem. for Summ. J. at 21.

[Footnote continued from previous page]

retirement decision to no longer grant the retirees' additional increases. *Id.* at 796.

Defendant also focuses on a few words in the definition of "accrued benefit" to argue that an "accrued benefit" must be determined by the plan. Defendant asserts that at the time of his termination and retirement on March 31, 1997, Williams stopped accruing benefits under the Plan's terms. Therefore, because a COLA enhancement is available only when the Accrued Benefit is already being paid monthly to eligible Participants, the COLA enhancement could not be considered to be a part of Williams's Accrued Benefit under the Plan. Put another way, an enhancement (the COLA or any other) that becomes payable to a Participant after his retirement date and after he has begun receiving benefits from the Plan cannot qualify as an Accrued Benefit because the enhancement was not earned during the course of employment. Def. Memo in Supp. Of S.J. at 25. In sum, the COLA only becomes a factor after the Accrued Benefit is locked in and the Participant elects a payment method. This analysis dictates that the Plan's SPD correctly states that "the COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law," and the BAC's decision to deny Williams's benefit claim was proper and reasonable. See Facts ¶22; Def. Memo in Supp. Of S.J. at 25.

Defendant further argues that the Plan at issue here unambiguously states that a Participant is only eligible to receive a COLA enhancement after he voluntarily elects to receive his Accrued Benefit in a monthly payment and after he has begun receiving his distribution in monthly payments—which, by the Plan's terms and application, is after the Participant's Accrued Benefit has been calculated. In response to Williams's argument that the COLA "accrued" over the period of his participation in the

Plan, Defendant invokes the Plan's express terms, wherein a Participant does not become eligible to receive a COLA enhancement until (1) he has elected a monthly payment option; (2) he has begun receiving his Accrued Benefit; and (3) his Accrued Benefit is paid through a monthly payment optional form.

We repeat ERISA's definition of "accrued benefit" for emphasis: "Accrued benefit" means "the individual's accrued benefit determined under the plan and, except as provided in [ERISA § 204(c)(3)], *expressed in the form of an annual benefit commencing at normal retirement age.*" ERISA § 3(23) (emphasis added). Thus, as mentioned above, ERISA requires that any Plan definition of "accrued benefit" depends on the "annual benefit commencing at normal retirement age." *See Laurenzano*, 134 F. Supp. 2d at 200.

It is undisputed that the COLA at issue in the case at bar provides retirement income in the form of an annual benefit at retirement age. See Coyle Deposition, p. 31; 1994 Plan, Article XV, AR 00078-79; 2001 Plan, Article X, AR 001 93-94. "The COLA is an accrued benefit: its primary purpose is to provide retirement income, it commences only at retirement, and it is not a benefit generally transferable to succeeding employers." *See Hickey*.

The automatic COLA provided by the Plan is part of the annual benefit payable to a participant for the rest of his or her life. Pl. Memo. in Supp. of Summ. J. at 7; see, e.g., ERISA § 3(23), IRC § 411(a)(7) and Treasury Regulation 1.417(a)-7 (defining accrued benefit as an annual benefit commencing at normal retirement age). Under the Plan (and the law), this increasing annuity stream continues for the rest of the participant's life. See, 1994 Plan,

Article XV, AR 00078-79; 2001 Plan, Article X, AR 00193-94.

Defendant contends that the word "express" found in ERISA's definition of the term "accrued benefit" means only that the Accrued Benefit must be set, as a base, using the monthly single life annuity—not that the benefits will be paid as a monthly single life annuity or that each Participant receives all of the rights and enhancements available under that benefit payment option. Stated otherwise, the COLA enhancement is only provided under the Plan when a Participant elects a monthly distribution payment option—at that time, the Participant's Accrued Benefit will be enhanced as required by the Plan. Because the COLA "accrues," if at all, after a Participant elects to receive payment of his or her benefits through a monthly payment option, the COLA cannot be considered an Accrued Benefit for Participants, like Williams, who voluntarily elected to receive their Accrued Benefit in a lump sum before a COLA could attach. Def. Memo in Supp. of S.J. at 28.

As we have previously noted, "The term 'accrued benefit' has a statutory meaning, and the parties cannot change that meaning by simply labeling certain benefits as 'accrued benefits' and others, such as the COLA, as 'supplementary benefits.'" *Hickey*, 980 F.2d at 468. We know of no court decision to hold that a COLA earned during a period of employment is not an accrued benefit under ERISA. Defendant appears to claim that the COLA exists outside ERISA's protections during the participant's employment, but instantly attaches to his accrued benefit if he chooses the monthly payment option. However, if the COLA is part of the annuity (and it is), then ER-

ISA requires it to be included in the Class's lump sum distributions.

Finally, Defendant argues that Plaintiffs would be unjustly enriched if the Plan were required to add a COLA enhancement to its lump sum distribution. More specifically, Defendant contends that if Williams's lump sum calculation were to include the COLA, he and others receiving a lump sum distribution would be unjustly enriched vis-à-vis other Plan participants because they would effectively receive the value of the COLA twice: once through the monetary growth of their lump sum distribution received through investment since retirement and a second through the valuing of the COLA as monetary damages in this case. Def. Mem. for Summ. J. at 16. Such a result, in itself, would violate ERISA, the Plan contends, because it would grant Williams and the class members benefits greater than those received by other Participants who opted to receive monthly payments.

We believe the Defendant's suggestion that the Class would receive a windfall by receiving the COLA as well as any earned investment income to be factually incorrect. *See, e.g.*, Poulin Report, pp. 2-3. ERISA § 205(g)(3) includes, as part of determining present value, a discount for all years that the participant's age predates his normal retirement age. This discount is computed using market interest rates--currently the 30-year Treasury Bond rate--to reflect the fact that the participant can invest the lump sum. Poulin Report, pp. 2-3. To claim that the Class would somehow receive more under the Plan than participants electing an annuity ignores the fact that the lump sum calculations were already reduced to offset the time value of money.

After careful consideration of the meaning of "accrued benefit" and the terms of the Plan, we hold that this Plan violated ERISA, 29 U.S.C. 1054(c)(3),[10] by failing to include in Williams's and the class members' lump sum distributions the value of the COLA enhancement expressly available to those receiving monthly payments of their Accrued Benefit under the Plan. Specifically, the Plan's definition of "Accrued Benefits" does not satisfy ERISA's definition of that term because the COLA enhancement was not included when calculating the value of his lump sum distribution.[11]

In reaching this conclusion, that a COLA must be deemed an accrued benefit under the circumstances of this Plan when construed in light of ERISA and controlling Seventh Circuit precedent, we acknowledge that substantial complications in administering such a provision may result. COLAs are typically both speculative and contingent, turning on future economic tides which are unknowable at the time a lump sum payment is made, but the fact of such complications in terms of drafting and adminis-

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[10] This section mandates that if a defined benefit pension plan provides for a form of payment other than a life annuity beginning at normal retirement age (the "normal retirement benefit"), then this optional form must be the actuarial equivalent of the annuity.

[11] Because we grant Plaintiffs' motion for summary judgment for the reasons discussed herein, we decline to discuss the three, additional arguments raised by Plaintiffs: that the failing to include the COLA in calculating the lump sum distribution violates the present value requirements of section 205(g), the back-loading rules of section 204(b) and the forfeiture rules of section 203(a).

tering the plans can not alter the results of our analysis.

CONCLUSION

For the above reasons, Defendant's Motion for Summary Judgment is DENIED and Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Date: 12/22/2005

/s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

* * *

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 10, 2007

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 06-2555

GARY WILLIAMS,
Plaintiff-Appellee,

v.

ROHM and HAAS PENSION PLAN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division,

No. 04 C 78

Sarah Evans Barker, *Judge*.

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en

banc* and the judges of the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing en banc are DENIED.

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* Judges Flaum and Rovner took no part in the consideration of this case.

APPENDIX D

THE ROHM AND HAAS COMPANY
RETIREMENT PLAN

(Effective April 1, 2001)

* * *

ARTICLE II - PURPOSE

The primary purpose of the Plan is to provide pension benefits for eligible Employees of Rohm and Haas Company to supplement the retirement income benefits provided under the Social Security Act.

* * *

ARTICLE III - DEFINITIONS

The terms used herein shall have the following meanings, unless a different meaning is clearly required by the context:

3.1 "Accrued Benefit" means that portion of a Participant's Basic Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date, that has accrued as of any determination date in accordance with Article VII.

3.2 "Actuarial Equivalent" or "Actuarially Equivalent" means a benefit of equivalent actuarial value to the benefit that would otherwise have been provided to the Employee, determined on the basis of appropriate actuarial assumptions and methods set

forth in Appendices A through D attached hereto. For purposes of determining lump sum present values, the interest rate used shall be:

3.2.1 No greater than the interest rate used by the PBGC to determine the present value of lump sum distributions for plans terminating as of the first day of the Plan Year, if the present value of the benefit (using such rate) does not exceed $25,000; and

3.2.2 No greater than 120% of the rate described in Section 3.2.1, if the present value of the benefit (determined under Section 3.2.1) exceeds $25,000; provided that in no event shall the present value of the benefit determined under this Section be less than $25,000 or greater than the maximum benefit permitted under Section 7.5

* * *

ARTICLE VII - BASIC AMOUNT OF NORMAL RETIREMENT PENSION

7.1 Basic Amount of Normal Retirement Pension. Except as provided in Section 16.1, Section 16.2 and Section 7.5, the monthly Basic Amount of Normal Retirement Pension shall be the applicable amount set forth below:

7.1.1 Salaried and Certain Hourly Employees. Subject to Section 7.1.2 and Section 7.1.3, 1/12th of:

7.1.1.1 1.5% of the Participant's Basic Earnings Rate minus 0.35% of the Participant's Final Average Compensation multiplied by the number of completed years and any fractional parts thereof of Benefit Service up to a maximum of 44 years; plus

7.1.1.2 0.75% of the Participant's Basic Earnings Rate multiplied by the number of completed years and any fractional parts thereof of Benefit Service in excess of 44 years.

In no event, however, will the amount of benefits payable to any Salaried Participant under this Section 7.1.1 be less than the benefit accrued by such Participant as of December 30, 1989 under the terms of the Plan in effect on December 30, 1989.

7.1.2 Hourly Employees of Rohm and Haas Illinois. For Hourly Participants who are employed by Rohm and Haas Illinois the monthly Basic Amount of Normal Retirement Pension shall not be less than:

7.1.2.1 $11 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement through April 30, 1989;

7.1.2.2 $12 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement through April 30, 1990;

7.1.2.3 $13 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after April 30, 1990;

7.1.2.4 $15 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after April 30, 1991; and

7.1.2.5 $17 multiplied by the number of the Employee's completed years and any frac-

tional parts thereof of Benefit Service for retirement after September 30, 1993; and

7.1.2.6 $18 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after November 2, 1994.

7.1.3 Hourly Employees of Rohm and Haas Southern California. For Hourly Participants who are employed by Rohm and Haas Southern California the monthly Basic Amount of Normal Retirement Pension shall not be less than:

7.1.3.1 $5.50 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement through December 31, 1989;

7.1.3.2 $10 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after December 31, 1989 and before January 1, 1991;

7.1.3.3 $11 multiplied by the number of the Employees' completed years and any fractional parts thereof of Benefit Service for retirement after December 31, 1990 and before July 1, 1992; and

7.1.3.4 $14 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after July 1, 1992 and before July 1, 1993;

7.1.3.5 $16 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retire-

ment after July 1, 1993 and before July 1, 1994; and

7.1.3.6 $18 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after July 1, 1994.

7.2 Minimum Benefit. For any active or retired Participant who has completed at least 20 years of Service, the monthly Basic Amount of Normal Retirement Pension shall not be less than $300, payable in the form of a straight life annuity.

7.3 Special Rules for Calculating the Basic Amount of Normal Retirement Pension. The following rules shall apply in calculating the Basic Amount of Normal Retirement Pension payable to a Participant:

7.3.1 Long-Term Disability Allowance Payments. The Basic Amount of Normal Retirement Pension for an Employee who is entitled to service credit from the Plan based upon the receipt of Long-Term Disability Allowance payments in accordance with Section 3.26 shall be computed in accordance with Article VIII or the corresponding provisions of the Prior Plan, whichever provision was applicable at the date of the Salaried Employee's receipt of the Long-Term Disability Allowance.

7.3.2 Salaried Employees of Furane. Salaried Employees of the Furane Products Company will be provided a monthly amount of pension attributable to Benefit Service accrued prior to November 1, 1983 based upon the pension plan formula contained in the Prior M&T Plan, and their Basic Earnings Rate determined in accordance with Sec-

tion 3.9 of this Plan at the earlier of their date of termination or retirement.

7.3.3 Salaried Participants in Plaskon Plan. A Salaried Participant who was a participant in the Plaskon Plan on December 31, 1989 and who is employed by the Company after October 31, 1990 will be provided a monthly pension that is the greater of (i) the pension calculated under the Plaskon Plan with respect to service with Plaskon before December 31, 1989 and calculated under the Plan with respect to service with Plaskon and the Company after December 30, 1989, or (ii) the pension calculated under the Plan with respect to Benefit Service beginning with the Salaried Participant's date of hire by Plaskon.

7.3.4 Actuarial Reduction - All Employees. The annual benefit accrual of a Participant employed after his Normal Retirement Date shall be reduced, but not below zero, by the Actuarial Equivalent of the total Plan benefits distributed to the Participant by the close of the Plan Year. For purposes of this Section, "total Plan benefits" shall not include any part of a distribution that exceeds the amount that would have been distributed to the Participant under the Plan's applicable normal form of payment.

7.4 Extended Wear-away Provisions - Effective December 31, 1994. Unless otherwise provided under the Plan, each section 401(a)(17) Employee's Accrued Benefit under this Plan will be the greater of the Accrued Benefit determined for the employee under 7.4.1 or 7.4.2 below:

7.4.1 the Employee's Accrued Benefit determined with respect to the benefit formula applicable for the Plan Year beginning on or after December

31, 1994, as applied to the section 401(a)(17) Employee's total Benefit Service, or

7.4.2 the sum of:

7.4.2.1 the section 401(a)(17) Employee's Accrued Benefit as of December 30, 1994, frozen in accordance with Treas. Reg. § 1.401(a)(4)-13, and

7.4.2.2 the section 401(a)(17) Employee's Accrued Benefit determined under the benefit formula applicable for the Plan Year beginning on or after January 1, 1994, as applied to the section 401(a)(17) Employee's Benefit Service credited to the section 401(a)(17) Employee for Plan Years beginning on December 31, 1994.

A "section 401(a)(17) Employee" means an Employee whose current Accrued Benefit as of a date on or after the first day of the first Plan Year beginning on or after January 1, 1994, is based on a Basic Earnings Rate for a Plan Year beginning before December 31, 1994, that exceeded $150,000.

7.5 Limitation on Annual Benefits - Code Section 415.

7.5.1 Primary Limit. In no case shall the annual benefit with respect to any Participant payable under the Plan and all other defined benefit plans maintained by the Company, when expressed in the form of a straight life annuity, exceed the lesser of:

7.5.1.1 $90,000 (or such other amount as may be prescribed under regulations issued by the Secretary of the Treasury under section 415(d) of the Code) multiplied by a fraction (which may not exceed one), the numerator of

which is the number of the Participant's years of participation in the Plan and the denominator of which is 10; or

7.5.1.2 the greater of $10,000 or 100% of the Participant's average annual Compensation received during the three consecutive calendar years of his participation during which he receives the greatest aggregate annual Compensation, multiplied by a fraction (which may not exceed one) the numerator of which is the number of the Participant's Years of Service and the denominator of which is 10. The $10,000 limit shall not apply if the Participant participates in any defined contribution plan maintained by the Company.

7.5.1.3 If a Participant's benefit is payable in any form other than a straight life annuity, the determination as to whether the limitation of this Section 7.5.1 has been satisfied shall be made by adjusting such benefit to the form of a straight life annuity using an interest rate equal to the greater of 5% or the interest rate provided Appendix D.

However, for purposes of such adjustment, any ancillary benefit that is not directly related to retirement income benefits and that portion of any joint and survivor annuity that constitutes a Qualified Joint and Survivor Annuity shall not be taken into account.

7.5.1.4 To the extent provided under regulations issued by the Secretary of the Treasury, the reductions in maximum annual benefits described in this Section 7.5.1 shall be applied separately with respect to each change in the benefit structure of the Plan.

7.5.1.5 If a Participant was a Participant in this Plan on July 1, 1982, Section 7.5.1 shall not reduce that Participant's benefit below his Accrued Benefit determined as of September 30, 1983.

7.5.2 If a Participant retires either before or after the Participant's Social Security Retirement Age, the limit of Section 7.5.1 shall be adjusted in accordance with section 415(b) of the Code and the regulations thereunder:

7.5.2.1 In the case of a benefit payable to a Participant beginning before he reaches his Social Security Retirement Age, to an amount that is the equivalent of an annual benefit equal to such limit beginning at his Social Security Retirement Age, using an interest rate at least equal to the greater of 5% or the interest rate provided in Appendix D. The adjustment provided for in the preceding sentence shall be made in the manner prescribed by the Secretary of the Treasury, which is consistent with the reduction for old-age insurance benefits beginning before the Social Security Retirement Age under the Social Security Act; or

7.5.2.2 In the case of a benefit payable to a Participant beginning after he reaches his Social Security Retirement Age, to an amount that is the equivalent of an annual benefit equal to such limit beginning at his Social Security Retirement Age, using an interest rate equal to the lesser of 5% or the interest rate provided in Appendix D.

7.5.3 Notwithstanding anything to the contrary in Sections 7.5.1 and 7.5.2, in the case of an Employee who was a Participant as of the first day of

the first Limitation Year beginning after 1986, the limitations of this Section 7.5 shall not cause such Participant's benefit under all defined benefit plans maintained by the Company to be less than his Accrued Benefit under the Plan determined as if the Employee had terminated employment on December 31, 1986, when expressed as a straight life annuity. In determining the amount of a Participant's Accrued Benefit, (a) any change in the terms and conditions of the Plan after May 5, 1986, and (b) any cost-of-living adjustments occurring after 1986 shall be disregarded.

7.5.4 Combined Limit. If a Participant participates in one or more defined benefit plans and one or more defined contribution plans, or a welfare benefit fund as defined in section 419(e) of the Code, or an individual medical account, as defined in section 415(l)(2) of the Code, the sum of the defined benefit fraction and the defined contribution fraction for any Limitation Year shall not exceed 1.0.

7.5.4.1 Defined Benefit Fraction. The defined benefit fraction for any Limitation Year is a fraction (i) the numerator of which is the Participant's projected annual benefit (determined as of the close of the Limitation Year) under all such Defined Benefit Plans (whether or not terminated), and (ii) the denominator of which is the lesser of (A) $90,000, or the applicable dollar limit for such Limitation Year multiplied by 1.25 (1.0 if the Plan is a super top-heavy plan, as defined in Section 20.3), or (B) the Participant's average annual Compensation for the three consecutive calendar years of active participation, that produce the highest average, multiplied by 1.4.

7.5.4.2 Defined Contribution Fraction. The defined contribution fraction for any Limitation Year is a fraction (i) the numerator of which is the total of the amount treated as annual additions, under section 415(c) of the Code, to the Participant's accounts as of the close of the Limitation Year under all defined contribution plans maintained by the Company (whether or not terminated), and (ii) the denominator of which is the lesser of the following amounts determined for the Limitation Year and for each prior Limitation Year for which the Participant was an Employee (regardless of whether any Plan was in existence during such year):

(A) $30,000, or the applicable dollar limit for each such Limitation Year, multiplied by 1.25 (1.0 if the Plan is a Super Top-Heavy Plan), or

(B) 35% of the Participant's Compensation, as defined in Section 3.14, for each such Limitation Year.

7.5.4.3 Transitional Rule: The denominator of the defined contribution fraction under Section 7.5.4.2 for all Limitation Years ending before January 1, 1983 shall, at the Administrative Committee's election, be the denominator determined for the Limitation Year ending in 1982, multiplied by a fraction, (i) the numerator of which is the lesser of $51,875 or 35% of the Participant's 1981 compensation and (ii) the denominator of which is the lesser of $41,500 or 25% of the Participant's 1981 compensation.

* * *

ARTICLE XI - AMOUNT OF PENSION PAYABLE AT RETIREMENT

11.1 Amount of Pension. The amount of pension payable to a Participant under the normal form of payment shall be determined by reducing the Basic Normal, Early or Special Early Retirement Pension otherwise determined in accordance with Article VII, Article VIII, or Section 9.1, and, if applicable, Article XIX, by 100% of such Participants' Statutory Benefits and multiplying this amount by the factor set forth in Section 11.1.1 and by the factor set forth in Section 11.1.2 or 11.1.3:

11.1.1 100% minus the sum of (i) .0417% multiplied by the total number of full calendar months that the optional preretirement death benefit for a Spouse, described in Section 13.6, was in effect for the Participant and the Participant's Spouse from the time the Participant was age 55 through age 60 and no months, plus (ii) .0583% multiplied by the total number of full calendar months that said death benefit was in effect from the time the Participant was older than age 60 and no months but in each case only with respect to periods prior to August 23, 1984 or December 31, 1984 as set forth in Article XIII.

11.1.2 In any situation where the straight life annuity is the normal form of payment, such factor will be 100%.

11.1.3 Except as provided in Section 12.4, in any case where the Contingent Annuitant Annuity form is the normal form of payment, such factor will be the Actuarially Equivalent factor, established by the Administrative Committee, which factor takes into account the age of the Participant and the Participant's Contingent Annuitant. Actuarial Equiva-

lent values shall be determined as specified in Appendix D.

* * *

ARTICLE XII - OPTIONAL FORMS OF RETIREMENT INCOME BENEFITS

12.1 Optional Forms. A Participant, other than an Hourly Participant employed by Rohm and Haas Illinois or Rohm and Haas Southern California may elect, in writing prior to actual retirement, to convert the pension otherwise payable to the Participant after retirement into a benefit of Actuarially Equivalent value in accordance with one of the options set forth below:

12.1.1 Option A: A pension payable during the Participant's life with the provision that after death a pension equal to 100%, 75%, 66 2/3%, 50%, or 25% of the Participant's pension, as the Participant may elect, shall be continued during the life of, and shall be paid to, such person as the Participant shall have designated as Contingent Annuitant in a written notice of election; provided, however, that if the Contingent Annuitant is not the Spouse of the Participant, the Actuarially Equivalent value of the pension payable to the Contingent Annuitant, determined at the Participant's retirement date, shall not be greater than 50% of the Actuarially Equivalent value of the pension the Participant would have received without having elected this Option A; or

12.1.2 Option B: A pension payable during the Participant's life with the provision that if the Participant should die before receiving 60, 120, 180 or 240 monthly pension payments, as the Participant may elect, the Participant's Beneficiary shall receive the Commuted value of the balance of the 60, 120,

180 or 240 monthly pension payments, whichever is applicable, in such manner as shall be determined by the Administrative Committee; or

12.1.3 Option C: A pension payable during the Participant's lifetime with no further payments due after the last day of the month following or coincident with the date of the Participant's death.

12.1.4 Option D: A lump sum distribution of the Actuarial Equivalent value of the Participant's vested Accrued Benefit, determined in accordance with Appendix D.

12.1.5 Option E: A direct trustee-to-trustee transfer of the Actuarial Equivalent value of the Participant's Accrued Benefit, as determined in accordance with Appendix D, to an "eligible retirement plan," as defined in section 401(a)(31)(D) of the Code.

12.2 Death Before Annuity Starting Date. If an election is made under Option A above and the death of either the Participant or the designated Contingent Annuitant occurs prior to the Participant's Annuity Starting Date, the election shall be void. However, if such an election is made and the death of either the retired Participant or the designated Contingent Annuitant occurs after the Participant's Annuity Starting Date, the election shall remain in effect.

12.3 No Designated Beneficiary. If benefits become payable under Option B and no designated Beneficiary survives the retired Participant, the Administrative Committee may designate a Beneficiary in the following order of priority: wife or husband, children (including adopted children), next of kin, dependents of the Participant, a trustee under a deed

of trust established by the Participant, or the Participant's executor or administrator (but in no event the Company) and direct payment of such benefits to the Beneficiary thus designated in such amounts and in such manner as in its sole judgment is advisable.

12.4 Optional Forms for Certain Hourly Participants. Hourly Participants who are employed by Rohm and Haas Illinois or Rohm and Haas Southern California may elect the following optional forms of benefit, subject to the rules concerning spousal consent as described in Section 10.4:

12.4.1 A pension payable during the Hourly Participant's life, reduced by 10%, with the provision that after the Hourly Participant's death a pension equal to 50% of the Hourly Participant's pension shall be paid to the Hourly Participant's Beneficiary;

12.4.2 A pension payable during the Hourly Participant's life, reduced by 15%, with the provision that after the Hourly Participant's death a pension equal to 66 2/3% of the Hourly Participant's pension shall be paid to the Hourly Participant's Beneficiary;

12.4.3 A pension payable during the Hourly Participant's life, reduced by 20%, with the provision that after the Hourly Participant's death a pension equal to 100% of the Hourly Participant's pension shall be paid to the Hourly Participant's Beneficiary;

12.4.4 A pension payable during the Hourly Participant's life, reduced by 7%, with the provision that if the Hourly Participant should die before the Hourly Participant has received 120 monthly pension payments, the Hourly Participant's

Beneficiary should receive the commuted value of the balance of the 120 monthly pension payments; and

12.4.5 A pension payable during the Hourly Participant's life, reduced by 13%, with the provision that if the Hourly Participant should die before the Hourly Participant has received 180 monthly pension payments, the Hourly Participant's Beneficiary should receive the commuted value of the balance of the 180 monthly pension payments.

* * *

ARTICLE XV - COST-OF-LIVING ADJUSTMENTS TO PENSIONS

15.1 Amount of Cost-of-Living Adjustment. Except as provided in Sections 15.3 and 15.4, beginning with pension payments in March, 1974 (March 1975 for Rohm and Haas Texas Incorporated) and each March thereafter, any Participant age 60 or older who has retired from the Company, or any Contingent Annuitant or Beneficiary of an eligible Participant (or a Participant who would have been eligible except for age), who is receiving monthly payments, shall be entitled to an annual Cost-of-Living Adjustment as described below:

15.1.1 For Salaried Participants, or any Contingent Annuitant or Beneficiary of an eligible Salaried Participant, the initial Cost-of-Living Adjustment payable to the otherwise eligible Participant on the March 31st subsequent to the year of retirement will be provided at the rate of 1/12 for each full month of retirement during the preceding calendar year;

15.1.2 Subsequent Cost-of-Living Adjustments for Salaried Participants and the initial Cost-

of-Living Adjustments payable to all other otherwise eligible Participant (or Contingent Annuitant or Beneficiary of an eligible Participant, or a Participant who would have been eligible except for age) shall be the full amount of the adjustment otherwise provided by this Section (and without regard to Section 15.1.1, for Salaried Participants). However, such adjustments shall not apply to the supplemental benefits provided for by Sections 8.2 and 8.3, or Section 9.1. The Cost-of-Living Adjustment shall be equal to the percentage increase in the United States Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W Revised) from the previous December to the December of the year immediately preceding such March 31 adjustment date, subject to the following additional conditions and limitations:

15.1.2.1 in no event shall the Cost-of-Living Adjustment in pension in any year be greater than 3%;

15.1.2.2 should the increase in such Consumer Price Index be in excess of 3% in any year, the amount of such excess shall not be carried forward to any succeeding year; and

15.1.2.3 there shall be no decrease in the amount of a Participant's pension by reason of any decrease in such Consumer Price Index that might take place in any year. However, for any year(s) for which this Section applies, determination of any subsequent increase in the Cost-of-Living Adjustment will be made using the last highest December level of the CPI-W Revised and not the level of the previous December.

15.2 Time of Adjustment. Any such adjustment shall be payable with the pension payment for the month of March following the close of such calendar

year in an amount determined by Sections 15.1.1 (if applicable) and 15.1.2 of this Section as well as Section 15.3. In the event a Participant retires in accordance with the provisions of Section 8.1.2, or Section 9.1, such adjustment for increases in the Cost-of-Living shall not become effective until the March 31 coincident with or next following the attainment of age 60 (and without regard to the limitation imposed by Section 16.1.1).

15.3 Participants Eligible for Age 56/30 Years Supplemental Benefit. A Participant who is eligible for and elects to receive the Supplemental Benefit set forth in Section 8.3, shall be eligible for the aforementioned Cost-of-Living Adjustment in accordance with the following schedule:

Participant's Attained Age at the Time of Retirement	Cost-of-Living Adjustment to be effective on the March 31 Coincident with or Following the Participant's
At least 59 years but less than 60 years	61st birthday
At least 58 years but less than 59 years	62nd birthday
At least 57 years but less than 58 years	63rd birthday
At least 56 years but less than 57 years	64th birthday

However, a Contingent Annuitant or Beneficiary (who elects to continue receiving monthly payments) who survives a retired Participant covered by this Section shall be entitled to the annual Cost-of-Living Adjustment provided for in this Section beginning with the March 31 coincident with or next following the death of the Participant regardless of the Participant's age at the time of death.

15.4 Inapplicability. This Section shall not be applicable to Salaried Employees of Romicon, Furane Products Company, or EMCA, or Hourly Employees of Rohm and Haas Illinois or Rohm and Haas Southern California,

* * *

APPENDIX D – ACTUARIAL EQUIVALENT VALUES

Effective December 30, 1984

Option(s):

Straight Life Annuity Converted into Actuarial Equivalent Options other than a Lump Sum:

Interest Rate	Mortality Table
7%	1984 PBGC Unisex Table

Straight Life Annuity converted into Actuarial Equivalent Lump-sum payment.

Interest Rate	Mortality Table
* Prior to October 1, 1980	6% per annum
October 1, 1980	9-1/2% per annum
January 1, 1981	The Plan's Enrolled Actuary will determine quarterly the average interest rate used by major
November, 1985	

	insurance companies providing single-sum immediate annuities for individuals between ages 50 and 65. If the arithmetic average interest determined changes by at least one half (1/2) of one-percent from the interest rate currently in effect, the new interest rate will be implemented beginning with the next Calendar quarter for lump-sum distributions. If lump-sum termination values decline in the future under the above mentioned procedures, the lump-sum termination value payable shall not be less than the "frozen" termination value determined as of September 30, 1980.
December, 1985	The Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date). If the interest rate for the month following retirement declines, the

	lower rate will be used to adjust the lump sum payment.
January 1, 1987	For Participants less than age 50, the Pension Benefit Guaranty Corporation's interest rates for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date).
	For Participants age 50 or older, the Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date). If the interest rate for the month following retirement declines, the lower rate will be used to adjust the lump sum payment.
1992 Voluntary Early Retirement Date	For a Salaried Participant retiring before 1995 on his Voluntary Early Retirement Date, 6.25%

1994 Voluntary Early Retirement date	For an Hourly Participant retiring under the VRP Program in 1994, 5.25%
1995 Voluntary Early Retirement Date	For an Hourly Participant retiring under the VRP Program in 1995, 5.00%
1994 Separations Under the Involuntary Early Retirement Program	For separations during 1994 under the Involuntary Early Retirement Program: (i) for purposes of valuing a Participant's supplemental pension benefit, the Pension Benefit Guaranty Corporation's interest rate for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date), and (ii) for purposes of valuing a Participant's regular pension benefit: (x) the Pension Benefit Guaranty Corporation's interest rates for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if the Participant is less

	than age 50, or (y) the Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if Participant is age 50 or older.
Separations Between January 1, 1995 and March 31, 1997	For separations between January 1, 1995 and March 31, 1997 the lesser of (i) annual rate of interest on 30-year Treasury securities for the month before the date of distribution, or (ii) the greater of (x) 6%, or (y) the applicable interest rate determined below. For purposes of valuing a Participant's supplemental pension benefit, the Pension Benefit Guaranty Corporation's interest rate for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date). For purposes of valuing a

Participant's regular pension benefit: (x) the Pension Benefit Guaranty Corporation's interest rates for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if the Participant is less than age 50, or (y) the Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if Participant is age 50 or older. For participants retiring outside of the Involuntary Early Retirement Program, if the interest rate for the month following retirement declines, the lower rate will be used to adjust the lump sum payment.

* * *

APPENDIX E

Rohm and Haas Company
Retirement Plan

Summary Plan Description

Based on the
Plan as amended
through May, 2002

* * *

What is a "COLA" and am I eligible to receive it?

The cost of living adjustment or "COLA" is an annual adjustment to monthly payments from the Plan intended to keep pace with inflation. The amount of the annual increase is based on the increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the previous year but is limited to no more than 3% of your annual benefit in any year.

If you, your spouse, contingent annuitant, or other beneficiary, are receiving monthly benefit payments under the Plan, beginning at age 60 your monthly benefit will be adjusted to reflect the COLA.

The COLA only applies to monthly payments; it does NOT apply if you receive your benefit in the form of a cash lump sum.

The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law. The Plan may, at its discretion, eliminate the COLA at any time, regardless of whether it has made COLA payments in the past.

* * *

83

No. 07-906

FILED
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SUPREME COURT, U.S.

In The Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS, Individually and on Behalf of Others Similarly Situated,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the automatic cost-of-living adjustment ("COLA") provided to participants in the Rohm and Haas Pension Plan is an accrued benefit that cannot be retroactively eliminated or reduced and which, discounted to present value, must be included in a lump-sum payment of the accrued benefit.

PARTIES TO THE PROCEEDING

The Petition fails to describe the plaintiff class represented by respondent Williams. Pursuant to the parties' stipulation and the District Court's order, the class is defined as "[a]ll participants in the Rohm and Haas Pension Plan (the "Plan") who received a lump sum distribution from the Plan which did not take into account a cost of living adjustment in calculating the lump sum distribution." The parties estimate that the class consists of over 4,000 Plan participants.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT	1
REASONS FOR DENYING THE PETITION	7
I. THE PETITION IS DEFEATED BY THE PLAN'S ERRONEOUS FACTUAL CONTENTION THAT THE COLA IS DISCRETIONARY	7
II. THE PLAN HAS IMPERMISSIBLY CHANGED ITS POSITION ON *HICKEY*	8
III. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE WHETHER AN AUTOMATIC COLA IS AN ACCRUED BENEFIT	9
IV. THERE IS NO CONFLICT AMONG THE CIRCUITS ON WHETHER A PLAN CAN DRAFT AROUND ERISA'S PROTECTION OF "ACCRUED BENEFITS"	12
A. The Automatic COLA Entitlement Is an "Accrued Benefit"	12
B. There Is No Circuit Conflict Concerning the Determination of Accrued Benefits	15
C. The Automatic COLA Is Not a "Retirement-Type Subsidy"	17

TABLE OF CONTENTS – Continued

Page

V. THE PLAN IGNORES THE IRS'S POSITION THAT AUTOMATIC COLAS ARE ACCRUED BENEFITS 19

VI. THE SEVENTH CIRCUIT'S DECISION WILL HAVE NO IMPACT ON THE FUNDING AND TERMINATION OF PENSION PLANS, INCLUDING THE ROHM AND HAAS PLAN 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 15

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TABLE OF AUTHORITIES – Continued

Page

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26 U.S.C. § 411(a) 1

26 U.S.C. § 411(d)(6)(B)(i) 17

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 1002(23) 12

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29 U.S.C. § 1054(c)(3) 1

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29 U.S.C. § 1082(c)(8) 5

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TABLE OF AUTHORITIES – Continued

Page

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COUNTERSTATEMENT

1. The Seventh Circuit held that an automatic cost-of-living adjustment ("COLA") that a plan promises to participants is an "accrued benefit" that cannot be retroactively eliminated or reduced. The Court of Appeals based its decision on the provisions of the Rohm and Haas Pension Plan ("Plan") and its holding in *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir. 1992), that a plan cannot draft around the protections of accrued benefits provided by the Employee Retirement Income Security Act ("ERISA").

The Plan admits, as it must, that any alternative form of benefit payment, such as the lump sums in this case, must provide a dollar amount actuarially equivalent to a participant's accrued benefit.[1] Participants cannot be required to forfeit a portion of their accrued benefit as the price of receiving an alternative form of benefit payment such as a lump sum.[2] The Plan does not dispute that if the COLA is part of participants' accrued benefit its value must be included in lump-sum distributions. The Plan also concedes that the lump sums it paid to respondent Williams and the members of the class he represents

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[1] Actuarial equivalency is required by ERISA Section 204(c)(3), 29 U.S.C. § 1054(c)(3), and Treasury Regulation 1.417(e)-1(d), 26 C.F.R. § 1.417(e)-1(d). *See Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 759 (7th Cir. 2003); *Esden v. Bank of Boston*, 229 F.3d 154, 163-165 (2d Cir. 2000).

[2] *See Berger*, 338 F.3d at 762-763; *Esden*, 229 F.3d at 173; 29 U.S.C. § 1053(a); 26 U.S.C. § 411(a); 26 C.F.R. § 1.411(a)-4.

did not include the COLA's present value and were not actuarially equal to the retirement annuities participants would have received had they not elected lump sums.

2. The Plan tries to capture the Court's attention by misrepresenting that the Seventh Circuit "expressly declined" to look at the pertinent Plan provisions and adopted a "*per se*" rule that "if provided to a participant, a COLA is *always* part of every participant's 'accrued benefit' – regardless of the terms of the plan. . . ." (Pet. 13, 14 n. 4; emphasis in original.) The Seventh Circuit did no such thing. Both the 1994 and 2001 versions of the Plan were in the record on appeal, the parties' briefs focused on the relevant provisions, and the Seventh Circuit's opinion relied upon the pertinent Plan provisions in holding that the COLA is an accrued benefit. (Pet. App. 2a-6a.)

The Plan further claims that under its terms the COLA is discretionary and can be eliminated at any time, even retroactively. The Plan's actual terms are indisputably to the contrary. The Petition ignores the controlling provisions. Both the 1994 Plan (§ 15.1; Pet. App. 59a) and the 2001 Plan (§ 10.1) state unequivocally that a participant "shall be entitled to an annual Cost-of-Living Adjustment . . . " of the basic

monthly annuity payment upon retiring.[3] Nothing in either version of the Plan gives the Plan discretion to remove the COLA retroactively with respect to participants who are already receiving monthly annuity payments or active workers who have earned the COLA increase in their future annuities by providing service to Rohm and Haas. Quite the opposite, the Plan – as ERISA requires – states that it cannot retroactively eliminate a benefit such as the COLA:

> The Company reserves the right to amend or discontinue the Plan at any time, *but no such action shall adversely affect current rights or benefits theretofore acquired or accrued by any Participant* . . . , except such changes if any, as may be required to permit the Plan to meet the requirements of sections 401 and 404 of the Internal Revenue Code, or the applicable provisions of any other statute or except as otherwise permitted by law.

1994 Plan § 22.1 (not included in the Petition Appendix; emphasis added). *See also* 2001 Plan § 16.1.[4]

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[3] The provisions of the Plan included in Appendix D to the Petition, pp. 44a-67a, are not from the 2001 Plan, as the Appendix states, but instead from the 1994 Plan.

[4] Rohm and Haas recently acknowledged that the COLA cannot be retroactively eliminated. In December 2007, Rohm and Haas issued a newsletter announcing changes in its retirement benefits including the prospective elimination of the COLA with respect to benefit accruals after December 31, 2008. *Retirement Benefits: Important Changes to the U.S. Retirement Program*, Rohm and Haas, Dec. 2007, at 5. However, Rohm and

(Continued on following page)

The Plan admits that it adopted the automatic COLA as an adjustment to participants' monthly pension annuity payments to protect participants against the erosion of their retirement benefits from inflation. Patricia Coyle, the Plan's Rule 30(b)(6) deposition designee and its director of corporate employee benefits and secretary to the Benefits Administrative Committee until she retired on December 31, 2004, testified that:

> My understanding of the COLA, it was in there because the distribution, normal distribution from the pension plan is an annuity benefit and there was protection against inflation. . . .

Coyle Dep. 5-6, 31.

Thus, the COLA is not a separate or discretionary benefit received by participants when they retire. It is an integral component of their accrued benefit. The COLA was part of the Plan for the entire period during which the class members provided service to Rohm and Haas. Consequently, they *earned* a contractual as well as statutory right to the COLA that cannot be taken away. ERISA allows only the prospective elimination of an accrued benefit. *See Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739,

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Haas assured participants that "[t]his change has no effect on the benefit you earn through December 30, 2008. The amount you earn through that date, including the application of any COLA issued on monthly benefits paid after retirement, is protected and will not be reduced." *Id.*

743-747 (2004). Consequently, the actuarial value of the COLA must be included in participants' lump sums.

To support its contention that the COLA is discretionary, the Plan relies not on Plan provisions but instead statements in its 2002 Summary Plan Description ("SPD"). (Pet. 6; Pet. App. 68a-69a.) Neither the 1994 Plan nor the 2001 Plan contains a provision making the COLA a discretionary benefit. Indeed, a retroactive elimination of the COLA would violate both Plan Section 22.1, quoted above, and ERISA Section 204(g)(1), 29 U.S.C. § 1054(g)(1).[5] The Plan issued the 2002 SPD after learning of the decision in *Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Retirement Trust Plan*, 134 F. Supp. 2d 189, 199-201 (D. Mass. 2001), which held that, because an automatic COLA is an accrued benefit, its actuarial value must be included in lump-sum benefit distributions. As the Court of Appeals concluded, the 2002 SPD was intended to provide the Plan with a pretext for denying that the COLA is an accrued benefit and for excluding its actuarial value from lump sums. (Pet. 7a.) In any event, the 2002 SPD can have no legal effect on class members' benefits. It was issued 28

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[5] Section 204(g)(1) provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in [29 U.S.C. § 1082(c)(8) or 29 U.S.C. § 1441.]" The exceptions apply only to situations involving substantial business hardship and terminated plans with insufficient assets to pay all accrued benefits.

years after the COLA was first provided in March 1974 and after most class members had received their lump sums. The 2002 SPD specifically states that it has no substantive effect because the Plan's terms govern.[6] That is what ERISA requires: "When . . . the plan and the summary plan description conflict, the former governs, being more complete – the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons. . . ." *Health Cost Controls of Ill. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000).

Consequently, the Court of Appeals did not, as the Plan contends, mechanically apply a "per se" rule that all COLAs are accrued benefits. The Seventh Circuit properly examined the relevant Plan provisions, found that it promises participants a COLA that is automatically added to their monthly pension annuity payments, and properly held that, under the relevant facts and ERISA requirements, the COLA is

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[6] The Plan omitted the following paragraph of the 2002 SPD from Appendix E to its Petition (Pet. App. 68a-69a): "This Summary Plan Description ("SPD") is not meant to interpret, extend, or change the Plan in any way. This SPD is only a summary and does not cover all of the provisions and is not the official text of the Plan. . . . In the event of any inconsistency between the information in this SPD and the Plan itself, or to the degree that the Plan contains more complete or detailed information or rules, the Plan document will govern." 2002 SPD at p. 1.

part of each participant's accrued benefit and must be included in lump-sum distributions. (Pet. App. 5a-6a.)

REASONS FOR DENYING THE PETITION

I. THE PETITION IS DEFEATED BY THE PLAN'S ERRONEOUS FACTUAL CONTENTION THAT THE COLA IS DISCRETIONARY.

As explained in the Counterstatement, the indisputable facts defeat the Plan's contention that the COLA is a discretionary benefit that the Plan can permissibly exclude from lump sums. Both lower courts found the COLA to be an entitlement under the Plan's provisions and not discretionary (Pet. App. 3a, 15a), and the Plan contains no terms giving it discretion to retroactively eliminate the COLA from the participants' pension benefits. This Court's practice is to defer to the factual findings of the lower courts upon which their legal conclusions are based. *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). Thus, plenary review by this Court would begin and end on a dispositive factual issue as to which there are no grounds for dispute. Review of such indisputable factual findings is plainly not a reason for exercising certiorari jurisdiction.

II. THE PLAN HAS IMPERMISSIBLY CHANGED ITS POSITION ON *HICKEY*.

In the Seventh Circuit, the Plan argued that *Hickey* had correctly held that the COLA provided by the plan in that case was an accrued benefit that could not be eliminated retroactively. (Initial Br. 20-22; Reply Br. 6-9, 13, 20-21.) The Plan attempted to distinguish *Hickey* from this case on the supposed ground that the terms of the *Hickey* plan explicitly provided that the COLA was an accrued benefit. The Plan persisted in viewing *Hickey* as correctly decided even in its Petition for Rehearing and Rehearing En Banc (pp. 1-2, 6-8). However, respondent Williams demonstrated, based on the record in *Hickey*, that there is no material difference between the Plan provisions in this case and the plan provisions in *Hickey*. (Br. of Plaintiffs-Appellees 17-19.) The plan in *Hickey* also purported to exclude the COLA from its definition of "accrued benefit" and contended that its definition should prevail. The Seventh Circuit rejected that argument and held that a plan cannot draft around ERISA's requirements. 980 F.2d at 468. The plan could not renege on its promise to provide the COLA merely because it had labeled the benefit as "supplementary" rather than "accrued." *Id.* Similarly here, the Plan cannot retract its promise to pay the COLA as part of participants' pensions merely by excluding the benefit from the Plan's own definition of "Accrued Benefit."

The Plan now changes tack and attacks *Hickey's* holding. The Plan contends that the Seventh Circuit's

decision in this case "perpetuated" *Hickey's* "erroneous statutory construction" of ERISA's definition of "accrued benefit." (Pet. 21.) A petitioner cannot advance an argument in this Court that it did not make below, much less make a 180-degree change in its position with respect to a controlling authority. *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001). The Plan's intent is transparent. The factual question whether the terms of the Plan in this case are sufficiently similar to the plan's provisions in *Hickey* to come within its holding is hardly an issue meriting this Court's attention. However, the Plan is bound by its acceptance of *Hickey's* holding below, which in any event was clearly correct. The Plan's attempted change in position in this Court provides a second reason for denying the Petition.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE WHETHER AN AUTOMATIC COLA IS AN ACCRUED BENEFIT.

The Petition is premised on supposed conflicts between the Seventh Circuit's decision in this case and decisions by the Fourth and Ninth Circuits. There is no conflict whatsoever. To the contrary, those cases support the Seventh Circuit's decision.

The Plan cites *Board of Trustees of Sheet Metal Workers' Nat'l Pension Fund v. Commissioner of Internal Revenue*, 318 F.3d 599 (4th Cir. 2003), as holding that a COLA was not an accrued benefit as to certain participants. (Pet. 11-12.) However, the Plan

ultimately admits (Pet. 13-14 n.4), as the Court of Appeals fully explained (Pet. App. 7a), that the Fourth Circuit's holding was limited to participants who retired *before* the COLA was adopted and who therefore did not earn the COLA during their employment: "It was a gratuitous benefit provided to them after retirement which therefore could be withdrawn without impairing the promised benefit that had accrued at their retirement." 318 F.3d at 604. There was no dispute in *Sheet Metal Workers* that, as in this case, the COLA was an accrued benefit as to participants who retired *after* it was adopted in 1991 and who therefore earned it through their employment. The Fourth Circuit explicitly distinguished *Hickey* because it had not addressed "whether the benefit would have become an accrued benefit for retirees who were first given the benefit after separation from service by retirement." 318 F.3d at 605 n. 2.

The COLA provided to retirees in *San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 U.S. App. LEXIS 13167, at *13 (9th Cir. May 19, 1994), was expressly limited to a specific two-year period. Thus, participants had no continuing right to receive the COLA after the two-year period expired. *Hickey* was distinguished by the fact that, as in this case, the plan "promised a COLA to extend indefinitely into the future. . . . *Id.* at *13 n. 3.

An earlier Ninth Circuit decision cited in *San Diego AFL-CIO Bus Drivers*, *id.*, is in full accord with the Seventh Circuit's decision in this case. In *Shaw v.*

International Ass'n of Machinists & Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir.), *cert. denied*, 471 U.S. 1137 (1985), the plan provided cost-of-living protection to retirees through a "living pension" feature that adjusted the salary component of the defined benefit formula to the current salary level of the position from which a participant had retired. The Ninth Circuit concluded that the living pension provision was an accrued benefit because it was not a separate benefit but instead modified the formula determining the pension payments beginning at normal retirement age. *Id.* at 1460, 1464-1465. It was also not an ancillary or early retirement benefit. *Id.* at 1463-1464. The Seventh Circuit in *Hickey* held that the Ninth Circuit's reasoning in *Shaw* applied fully to the COLA:

> The "living pension" feature was strikingly similar in principle to the COLA provision. Neither the "living pension" feature nor the COLA were included in the basic benefit formula. However, each operated upon that benefit formula to cause an adjustment to the retirement benefits.

980 F.2d at 469.

Thus the decisions of the Seventh, Fourth, and Ninth Circuits are perfectly consistent in holding that an automatic COLA earned by participants before retiring is an accrued benefit.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS ON WHETHER A PLAN CAN DRAFT AROUND ERISA'S PROTECTION OF "ACCRUED BENEFITS."

The Plan relies primarily upon its own definition of "Accrued Benefit," which does not refer to the COLA, to support its contention that the COLA is not an "accrued benefit" under ERISA. Contrary to the Plan's contention, the Circuits agree that ERISA controls which benefits are protected as accrued benefits, not a plan's self-serving provisions.

A. The Automatic COLA Entitlement Is an "Accrued Benefit."

The COLA has all the characteristics of an "accrued benefit," which ERISA defines as "the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age. . . ." 29 U.S.C. § 1002(23).

First, it accrues over time as the employee provides service to the employer. "[A]n employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time." *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1524 (3rd Cir. 1988), *cert denied*, 490 U.S. 1105 (1989); *see also Central Laborers' Pension Fund,* 541 U.S. at 743-747. It is not disputed that Williams and

each class member earned the COLA and was entitled to it when their employment with Rohm and Haas terminated.[7]

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[7] The Plan contends in a footnote (Pet. 21 n. 6) that the COLA could not be an accrued benefit because payment does not begin until months after the participant has retired, and therefore the COLA does not commence at normal retirement age as ERISA requires for an accrued benefit. This argument, which was not made below and is therefore waived, is frivolous. The Plan confuses entitlement to the COLA, which becomes effective upon the Plan's own terms upon retirement at normal retirement age, with the timing of payment after the participant has retired. 1994 Plan § 15.1 entitles each participant receiving a monthly annuity payment to begin receiving the COLA as of the March 31 subsequent to the year of retirement. However, the very next section, § 15.1.1, provides that the participant will be paid $^1/_{12}$ of the COLA "for each full month of retirement during the preceding calendar year." (Pet. App. 59a.) Thus, the participant receives a COLA payment for each month commencing at normal retirement age.

In the same footnote, the Plan erroneously argues (again for the first time) that early retirees' entitlement to the COLA under the Plan beginning at age 60 demonstrates that the COLA is not an accrued benefit. However, the fact that participants could have received the COLA even earlier is irrelevant to whether the COLA is an accrued benefit. Moreover, the case cited by the Plan – *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 987, 990 (10th Cir. 1991) – applied ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), as it read *before* 1984 ERISA amendments that protect early retirement benefits as accrued benefits under the anti-cutback rule. Aggravating its misplaced reliance on this out-dated case, the Plan misstates the Tenth Circuit's holding. That Court did not hold that "unreduced early retirement benefits were not accrued benefits because they did not commence at normal retirement age" (Pet. 22 n. 6) but instead that "to the extent the early

(Continued on following page)

Second, the COLA increases the dollar amount of each participant's retirement annuity. Indeed, the COLA cannot be a benefit separate from that annuity, as the Plan suggests, because it is a percentage increase calculated from that normal benefit.

The Plan claims that the phrase "determined under the plan" in the ERISA definition of "accrued benefit" gives a plan a free hand in deciding whether a particular benefit is an "accrued benefit" or instead a gratuity that the Plan can eliminate, even retroactively, with impunity. But Congress expressly intended ERISA's definition of "accrued benefit" to prevent plans from evading the new statute's protections of workers' pension benefits:

> It is necessary to provide a *statutory* definition of an "accrued benefit," because, unless this is a defined amount, vesting of an "accrued benefit" in whatever form is specified by the plan has little, if any, meaning.

H.R. Report No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 3670, 4726 (emphasis added).

The phrase "determined under the plan" allows each plan to select the monetary level of the benefit to be provided and to attach conditions to the benefit provided they comport with ERISA's requirements, but

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retirement benefits actuarially exceed the normal retirement benefits, the excess is not an accrued benefit. . . ." *Id.* at 990.

it does not permit the plan to exclude benefits from protection as "accrued benefits" if they satisfy ERISA's criteria for such protection. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-512 (1981); *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). As the Seventh Circuit correctly concluded in this case: "The Plan cannot avoid that which is dictated by the terms of ERISA." (Pet. App. 8a.) *See also Esden*, 229 F.3d at 172-173 (employers not required to provide pension benefits, but when they do, their plans must comply with ERISA's requirements).

B. There Is No Circuit Conflict Concerning the Determination of Accrued Benefits.

The cases cited by the Plan do not support its contention that there is a conflict among the Circuits on the question whether courts must defer to a plan's determination that the benefits it provides are not "accrued benefits" under ERISA. Just as the Seventh Circuit did in this case, these courts determined the participant's benefit entitlement by examining the plan's provisions in light of ERISA's requirements.

The Third Circuit in *Ashenbaugh*, for example, found that the benefits in question were early retirement benefits that had never vested because the conditions in the plan governing them had not been satisfied. The Court did not simply defer to the plan's position but instead determined that the benefits were not accrued benefits by applying ERISA's requirements. 854 F.2d

at 1523-1528. The same is true of *Hein v. FDIC*, 88 F.3d 210, 218 (3d Cir. 1996), which held that the participant had not satisfied the plan's conditions for certain early retirement benefits that were valid under ERISA.

De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989), permitted lump-sum distributions that were not equivalent to subsidized early retirement annuities, but that is irrelevant here. If a plan, as in *De Nobel*, specifically so provides, the actuarial equivalence requirement may permissibly be limited to lump sums based on accrued benefits at normal retirement age, not subsidized early retirement benefits. That is why the IRS requires plans to provide a specific notice to participants that the subsidized portion of an early retirement annuity may be lost if the participant opts for an unsubsidized lump-sum distribution. *See* TD 9256, Revised Regulations Concerning Disclosure of Relative Values of Optional Forms of Benefit, 71 Fed. Reg. 14,798 (Mar. 24, 2006).

Although the Plan cites the Ninth Circuit's decision in *Shaw* as conflicting with the Seventh Circuit's decision in this case, *Shaw* is fully consistent with the decision below. *Shaw rejected* a plan's contention that a COLA-like provision was not an accrued benefit. 750 F.2d 1463-1465. *Hickey* cited *Shaw* in support of its holding that an automatic COLA is an accrued benefit. 980 F.2d 468-469.

C. The Automatic COLA Is Not a "Retirement-Type Subsidy."

Grasping to find some ERISA category for the COLA other than "accrued benefit," the Plan tries to "shoehorn" the COLA into the definition of "retirement-type subsidy." *Hickey* correctly held that once the COLA is found to be an accrued benefit, the retirement-type subsidy issue becomes irrelevant. *See Hickey*, 980 F.2d at 470. In any event, the COLA is not a "retirement-type subsidy" under ERISA and the governing Treasury Regulation, which the Plan ignores.

A retirement-type subsidy is a type of benefit, such as an early retirement benefit (the most common example) or a survivor's annuity, that is an *alternative* to the participant's pension benefit provided at normal retirement age and that is actuarially more valuable than the normal retirement benefit, with the excess value being the subsidy. *See, e.g., Ashenbaugh*, 854 F.2d at 1527-1528. The Tax Court has held that a COLA that increases pension benefits beginning at normal retirement age is not a retirement-type subsidy: "The concept of a retirement-type subsidy has an accepted meaning as it is used in section 411(d)(6)(B)(i). It does not refer to postretirement COLAs. It refers to amounts paid to early retirees above their normal pension benefits." *Board of Trustees of Sheet Metal Workers' Nat'l Pension Fund v. Commissioner of Internal Revenue*, 117 T.C. 220, 2001 U.S. Tax Ct. LEXIS 50 at *27 (Dec. 4, 2001), *aff'd*, 318 F.3d 599 (4th Cir. 2003).

A COLA is also not a "retirement-type subsidy" under the applicable Treasury Regulation, 26 C.F.R. § 1.411(d)-3(g)(6). The Regulation defines "retirement-type subsidy" as "the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age. . . ." The Regulation in turn defines "retirement-type benefit" as either "[t]he payment of a distribution alternative with respect to an accrued benefit" or "the payment of any other benefit under a defined benefit plan . . . that is permitted to be in a qualified pension plan, continues after retirement, and is not an ancillary benefit."

Thus, to be a "retirement-type subsidy," the COLA must first be a "retirement-type benefit." But the COLA cannot be a "retirement-type benefit" because it is neither "a distribution alternative" nor "the payment of any other benefit." As *Hickey* held, 980 F.2d at 468, the COLA is not a separate benefit; it is a percentage increase in the annuity to which the participant is entitled at normal retirement age. It cannot even be calculated apart from the normal retirement benefit.

In addition, the COLA cannot be a "retirement-type subsidy" because it has no "excess" actuarial value when compared to the normal retirement annuity. The COLA is limited to a maximum of 3% of the annuity that it increases. In short, the COLA is an increase in the accrued benefit, not a more valuable alternative to the accrued benefit.

V. THE PLAN IGNORES THE IRS'S POSITION THAT AUTOMATIC COLAS ARE ACCRUED BENEFITS.

Not only are the Circuits in full accord with the Seventh Circuit's decision, but the Internal Revenue Service has long held that automatic pension COLAs earned during employment are accrued benefits and their value must be included in lump-sum benefit distributions. Even though the views of the IRS, the expert agency charged with enforcing ERISA, are entitled to considerable weight in determining whether particular types of benefits are accrued benefits, *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989), the Plan completely ignores them.

In 1975, the year after ERISA was enacted, the IRS published guidelines for implementing the new statute. The guidelines provide that even if a defined benefit plan's terms give a COLA only to participants who remain in service until normal retirement age, the COLA must also be provided to participants who terminate service prior to that age because it is part of the participants' accrued benefit:

> Q. A defined benefit plan subject to the minimum vesting standards of section 411 of the Code provides that normal retirement benefits are to be adjusted by a cost-of-living index after the normal retirement age. The plan does not specifically provide that participants who separate from service prior to the normal retirement age will have their vested benefits adjusted for changes in the

> cost of living after the participants attain normal retirement age. Does the plan meet the minimum vesting requirements of section 411?
>
> A. No. If the plan provides that the normal retirement benefit is adjusted for changes in the cost-of-living occurring after normal retirement age, it must also provide that the vested benefits of participants who separate from service prior to the normal retirement age will be similarly adjusted because the minimum accrued benefits required in section 411(b)(1) reflect the form as well as the amount of the normal retirement benefits. For example, if a plan allows early retirement but without cost-of-living adjustments until normal retirement age, then the cost-of-living adjustment for terminated vested participants need only reflect changes in the cost-of-living index that occur after the terminated vested participants attain the normal retirement age.

IRS Announcement 75-110; 1975 IRB LEXIS 32 at *41-42; 1975-43 I.R.B. 20 (Oct. 28, 1975).

In 1995 the IRS instructed that:

> For purposes of calculating a single-sum distribution of a participant's benefit, COLA increases in the dollar limitation and the compensation limitation must not be anticipated. *Where a plan formula provides that participant's benefit is increased each year by a COLA which is a function of the Consumer*

> *Price Index (CPI), a participant receiving a benefit in the form of a single sum must receive projections of the CPI increases (based on reasonable actuarial assumptions) as part of a single sum*, but only to the extent that the single sum does not exceed the actuarial present value of the lesser of the current dollar limitation or current compensation limitation[8] applicable to the participant.

IRS Announcement 95-99, *reprinted* in LEXIS, 95 TNT 229-3, Tax Analysts, Tax Notes Today, § III(B) (emphasis added).[9]

From at least 1994, the IRS has advised pension practitioners that the value of an automatic COLA must be included in lump-sum distributions:

> The plan ... provides for annual post-retirement cost-of-living increases based on the National Cost-of-Living index, but not to exceed 3% in any year. The plan states that for lump sum determination, it is assumed that there would be no increase in the COL index.

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[8] The terms "current dollar limitation" and "current compensation limitation" refer to federal tax law limits on the maximum amount of an individual's annual pension benefits and are irrelevant here.

[9] The IRS Manual adopts this same position with respect to COLAs. Internal Revenue Manual, Cost of Living Adjustments (COLAs), § 4.72.6.3.1(6)(A) (12-01-2002), available at http://www.irs.gov/irm/part4/ch52s08.html.

RESPONSE

> Subject to Section 415 . . . , an automatic cost-of-living provision is an integral part of the participant's accrued benefit and, therefore, must be taken into account when determining amounts payable under optional forms of benefit. The assumption that there will be no increase in the COL index in determining the lump sum would not be reasonable and, therefore, would result in the impermissible forfeiture of accrued benefits under section 411.

1994 Enrolled Actuaries Meeting, Questions to IRS/ Treasury and Summary of Their Responses (March 1994) at 1994-39.

VI. THE SEVENTH CIRCUIT'S DECISION WILL HAVE NO IMPACT ON THE FUNDING AND TERMINATION OF PENSION PLANS, INCLUDING THE ROHM AND HAAS PLAN.

The Plan's depiction of the supposedly dire consequences of the Seventh Circuit's decision for the pension system in the United States has no basis in reality.

First, the Seventh Circuit followed *Hickey*, which was decided in 1992. *Hickey* has not been mentioned as a factor in the country's pension problems. The Plan cites no pension fund insolvency which involved a COLA. Moreover, the IRS advised plans as early as 1975 that lump-sum distributions must include a

COLA's discounted value. This Plan, and any other plan providing a COLA, knew or certainly should have known that the COLA was an accrued benefit under ERISA and could have decided not to provide it or to eliminate it prospectively.

Second, because the lump-sum distribution must be the actuarial equivalent of the retirement annuity, the financial cost to plans is the same whether a participant receives the COLA as part of his accrued benefit beginning at age 65 or earlier through a discounted lump sum. Therefore, decisions by participants to take their pension benefits earlier as discounted lump sums impose no financial burdens on plans. The lack of a financial burden is demonstrated by the fact that after the Seventh Circuit denied rehearing in this case, Rohm and Haas stated that the Plan has sufficient funds to pay the actuarial value of the COLA to the class of retiree lump-sum recipients.[10]

Third, almost no pension plans governed by ERISA provide automatic COLAs. *See* Lowman, Group Variable Annuity Pension Plan, Society of Actuaries, Pension Section News 5, 6 (Mar. 2004).[11] *See also* J. Langbein & B. Wolk, *Pension & Employee Benefit Law* 157 (3d ed. 2000) (as of 1995 only 3% of

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[10] *Rohm and Haas Announces One-Time Non-Cash Pension Charge and Third Quarter 2007 Outlook*, Rohm and Haas, Oct. 15, 2007 (http://www.rohmhaas.com/wcm/news/index.page?).

[11] Available at http://www.soa.org/library/unclassified/psn0403.pdf.

participants in plans governed by ERISA were provided automatic COLAs). Indeed, despite making inquiries of her colleagues, Rohm and Haas's director of corporate employee benefits had never even heard of another plan providing an automatic COLA. Coyle Dep. 33-34.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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86

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IN THE

Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS,
Individually and on Behalf of Others
Similarly Situated,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. THE DECISION BELOW CANNOT BE RECONCILED WITH OTHER CIRCUITS' INTERPRETATIONS OF THE TERM "ACCRUED BENEFIT" UNDER ERISA 2

II. THE DECISION BELOW RESTS ON AN ERRONEOUS READING OF ERISA'S PLAIN LANGUAGE AND A MISUNDERSTANDING OF ITS STATUTORY OBJECTIVES 5

III. THE DECISION BELOW HAS FAR-REACHING IMPLICATIONS FOR ALL DEFINED BENEFIT PENSION PLANS 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 5

Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan,
854 F.2d 1516 (3d Cir. 1988) 4

Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r,
318 F.3d 599 (4th Cir. 2003) 2, 3

Cent. Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 6

Chevron USA, Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984) 9

De Nobel v. Vitro Corp.,
885 F.2d 1180 (4th Cir. 1989) 4

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 4

Mead Corp. v. Tilley,
490 U.S. 714 (1986) 1

San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.,
1994 WL 198663 (9th Cir. 1994) 3

Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan,
750 F.2d 1458 (9th Cir. 1985) 4, 5

STATUTES

I.R.C. § 411(a)(7)(A)(i) 2

29 U.S.C. § 1002(23)(A) 5, 6, 8

29 U.S.C. § 1054(g)(1)-(2) 8

REGULATIONS

Treas. Reg. § 1.401(a)-20 10

Treas. Reg. § 1.411(d)-3 ..... 8, 9, 10

Treas. Reg. § 1.411(d)-4 7

OTHER AUTHORITIES

Craig Copeland, *Retirees with Pension Income and Characteristics of Their Former Job*, Notes (Employee Benefit Research Inst.), Feb. 2003 11

H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 3670 8

REPLY BRIEF FOR PETITIONER

Respondent fails to come to terms with the lower courts' conflicting approaches to defining the scope of a plan participant's "accrued benefit" under the Employee Retirement Income Security Act ("ERISA"). Indeed, respondent makes no serious effort to reconcile the definition of "accrued benefit" endorsed by the Seventh Circuit in the decision below—which applied a *per se* rule that, regardless of a plan's terms, any cost-of-living adjustment ("COLA") constitutes part of a plan participant's "accrued benefit"—with the interpretive approach of the Fourth and Ninth Circuits, which determine the scope of a participant's "accrued benefit" using a case-by-case inquiry focused on the terms of the plan itself.

Respondent largely side-steps this clear split in interpretive methodology, and instead offers scattershot arguments based on superficial factual distinctions, opaque legislative history, and irrelevant agency pronouncements. None of these arguments can obscure the lower courts' widespread confusion regarding the definition of "accrued benefit" or detract from the exceptional "importan[ce]" of this issue. *Mead Corp. v. Tilley*, 490 U.S. 714, 726 n.11 (1986).

This Court's review is warranted to provide an authoritative answer to this sharply disputed and frequently recurring issue of ERISA plan interpretation, and to correct the Seventh Circuit's erroneous conclusion that the COLA offered by the Rohm and Haas Pension Plan ("Plan") constitutes part of the participants' "accrued benefit" even though the Plan explicitly *excludes* the COLA from its definition of that term. The uncertainty generated by this circuit

split undermines ERISA's statutory objectives and compromises the long-term interests of plan participants.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH OTHER CIRCUITS' INTERPRETATIONS OF THE TERM "ACCRUED BENEFIT" UNDER ERISA.

In direct conflict with the Seventh Circuit's holding that every COLA offered by a defined benefit pension plan is *per se* a component of the plan participants' "accrued benefit," the Fourth and Ninth Circuits have endorsed a case-by-case inquiry to determine whether a COLA or other plan feature is part of the participants' "accrued benefit." The simplistic factual distinctions that respondent draws between the decision below and the Fourth and Ninth Circuits' decisions do nothing to detract from the existence of this methodological conflict.

A. In *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner*, 318 F.3d 599 (4th Cir. 2003), the Fourth Circuit held that a COLA was not part of the "accrued benefit" of plan participants who had retired before the COLA was implemented because the terms of the plan did not include a COLA as an element of those participants' "accrued benefit." *Id.* at 605. The court explained that the "definition [of 'accrued benefit'] does not purport to describe what counts as an 'accrued benefit' for *all* participants in *all* qualifying plans. Rather, the statutory definition is a signpost directing us to look to the terms of the plan at issue." *Id.* at 602-03 (citing I.R.C. § 411(a)(7)(A)(i)) (emphases added). The statutory definition of "accrued benefit," the court continued, "does not describe what a given plan participant's accrued benefit would be. The

statute leaves this level of detail to plan drafters." *Id.* at 603.

Respondent does not address the stark methodological conflict between the Fourth Circuit's approach to defining "accrued benefit"—which "look[s] to the terms of the plan at issue" (*Sheet Metal Workers*, 318 F.3d at 603)—and the Seventh Circuit's holding that the "term 'accrued benefit' has a statutory meaning" that "the parties cannot change" by varying the terms of the plan. Pet. App. 6a. Respondent instead emphasizes that, in *Sheet Metal Workers*, the plan had been amended to include a COLA only after the participants in question had retired, while the Rohm and Haas Pension Plan included a COLA during respondent's employment. Opp. 10. This irrelevant distinction does not alter the fact that the Fourth and Seventh Circuits have adopted squarely conflicting approaches to defining the scope of a participant's "accrued benefit." In the Fourth Circuit, the terms of the plan are controlling; in the Seventh Circuit, the "statutory meaning" overrides the terms of the plan and mandates inclusion of any COLA offered by the plan within the participants' "accrued benefit."

Respondent has no greater success in reconciling the decision below with the Ninth Circuit's holding in *San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994). In that case, the court concluded that a COLA was not part of the plan participants' "accrued benefit" because the terms of the plan expressly limited the COLA's operation to a two-year period. *Id.* at *4. Respondent does little more than restate the holding of the case in an apparent effort to distinguish it on the ground that the COLA in the Rohm and Haas

Pension Plan is not temporally limited. Opp. 10. But this factual difference between the plans has absolutely no bearing on the methodological conflict between the Ninth Circuit—which examines a plan's terms to determine whether a plan feature is an "accrued benefit"—and the Seventh Circuit—which construes the statutory definition of "accrued benefit" to supersede the terms of the plan.

This methodological inconsistency regarding the definition of one of ERISA's most fundamental terms substantially undermines the "uniform administrative scheme" that ERISA was designed to establish (*Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)), and creates a compelling need for this Court's review.

B. Respondent also does not seriously confront the broader conflict between the Seventh Circuit's *per se* approach to defining a plan participant's "accrued benefit" and decisions in which other circuits have deferred to the terms of the particular plan at issue to determine whether a plan feature constituted part of a participant's "accrued benefit."

Outside of the COLA context, the Third, Fourth, and Ninth Circuits all look to the terms of the plan to define the scope of the plan participants' "accrued benefit." *See Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1465 (9th Cir. 1985) ("[T]he material available for interpreting ERISA's definition of 'accrual' always refers to the terms of the pension plan itself."); *see also Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1524 (3d Cir. 1988); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1194 (4th Cir. 1989).

Respondent makes almost no attempt to reconcile the case-by-case, plan-specific analysis in these decisions with the Seventh Circuit's refusal to defer to the terms of the Plan in defining the scope of a participant's "accrued benefit." For example, although the Ninth Circuit in *Shaw* "rejected a plan's contention that a COLA-like provision was not an accrued benefit" (Opp. 16 (emphasis omitted)), it "referr[ed] to the terms of the pension plan itself" in reaching that conclusion. 750 F.2d at 1465. It is the refusal of the Seventh Circuit to defer to the terms of the Plan—and its insistence on using the "statutory meaning" of "accrued benefit" to vary those terms—that place the Seventh Circuit at odds with the Ninth Circuit.

These conflicting methodologies are a source of confusion to plan actuaries and plan participants alike, who require certainty regarding the definition of "accrued benefit" to make informed decisions about plan funding and retirement planning. Only this Court can authoritatively resolve this interpretive inconsistency.

II. THE DECISION BELOW RESTS ON AN ERRONEOUS READING OF ERISA'S PLAIN LANGUAGE AND A MISUNDERSTANDING OF ITS STATUTORY OBJECTIVES.

Consistent with this Court's recognition that "private parties, not the Government, control the level of benefits" provided by an ERISA plan (*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981)), ERISA provides that the "accrued benefit" of participants in a defined benefit pension plan is an "individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29

U.S.C. § 1002(23)(A). The statutory definition reflects the fact that ERISA was not designed to dictate the level of benefits provided to plan participants but instead to "protect[ ] employees' justified expectations of receiving the benefits their employers promise them" under the terms of an ERISA pension plan. *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). The Seventh Circuit's unwillingness to defer to the terms of the Plan in defining the scope of the participants' "accrued benefit" disregards the plain language of ERISA and undermines the flexibility that the statute affords to plan sponsors in determining the scope of plan benefits.

To defend this countertextual and counterintuitive result, respondent first argues that the Seventh Circuit did not ignore the terms of the Plan because two versions of the Plan were included in the record, the parties discussed the Plan's provisions in their briefs, and the court referenced the Plan's terms in its decision. Opp. 2. But the fact that the Seventh Circuit had the Plan documents available to it and referred to the Plan's terms in its decision does not establish that the court properly "determined" the scope of the participants' "accrued benefit" "under the plan," as ERISA requires. 29 U.S.C. § 1002(23)(A). Indeed, the Seventh Circuit emphatically refused to defer to the Plan's terms—acknowledging that the Plan defines "the COLA to be an enhancement that is awarded to annuitants, over and above the accrued benefit" (Pet. App. 6a), but nevertheless concluding that the COLA was a component of the participants' "accrued benefit" because the "term 'accrued benefit' has a statutory meaning" that the parties cannot vary. *Id.* (internal quotation marks omitted).

Respondent also appears to take issue with the proposition that the terms of the Plan exclude the COLA from the definition of "accrued benefit," and devotes several pages to attempting to demonstrate that the decision to award the COLA is not "discretionary" under the Plan. Opp. 2-7. It has been undisputed throughout this litigation, however, that the Plan does not include the COLA within its definition of "accrued benefit." *See* Pet. App. 4a ("The parties agree that the plain terms of the Plan exclude the COLA from a participant's accrued benefit."); *see also* Pet. for Writ of Cert. 6 n.2. The only issue before the Seventh Circuit—and the only issue presented by this petition—is whether ERISA's provisions override the decision of the Plan's drafters to exclude the COLA from the definition of "accrued benefit." It is far too late for respondent to backtrack on his concession that, under the terms of the Plan, the COLA is excluded from the scope of the participants' "accrued benefit."[1]

Respondent also argues that the COLA is an "accrued benefit" because it "accrues over time as the employee provides service to the employer" and "increases the dollar amount of each participant's retirement annuity." Opp. 12, 14. But most retirement-type subsidies accrue over time and increase the dollar amount of a participant's annuity. *See*

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[1] Respondent's contention (at 8-9) that the Plan has shifted its litigating position in this case is makeweight. The Plan has consistently argued throughout this litigation that "ERISA's statutory definition of 'accrued benefit' . . . provides that a plan participant's accrued benefit is defined solely by the terms of the relevant pension plan" and that the Plan's COLA therefore is not a component of the participants' "accrued benefit." C.A. Br. of Pet'r 12 (emphasis omitted). That was the issue decided by the Seventh Circuit and is the one presented in this petition.

Treas. Reg. § 1.411(d)-4, Q&A-1(a) (retirement-type subsidies are subject to statutory protection from cutback "to the extent they have accrued"). This does not mean that retirement-type subsidies are part of a participant's "accrued benefit." *See* 29 U.S.C. § 1054(g)(1)-(2) (a participant's "accrued benefit" is protected from cutback under subsection (g)(1), while a retirement-type subsidy is protected under subsection (g)(2)); Treas. Reg. § 1.411(d)-3(g)(6)(iv) (a retirement-type subsidy provides a retirement benefit in excess of the value of a participant's "accrued benefit").

Respondent's effort to invoke ERISA's legislative history to support the Seventh Circuit's holding is equally unavailing. Opp. 14 (quoting H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 3670, 4726). The passage selectively quoted by respondent—which states that "[i]t is necessary to provide a statutory definition of 'accrued benefit'" (Opp. 14 (emphasis omitted))—continues on to explain that, "[i]n the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements." 1974 U.S.C.C.A.N. at 4726.[2] The legislative history thus does nothing more than restate the statutory definition of "accrued benefit"—which requires a participant's "accrued benefit" to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

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[2] With the exception of the parties' disagreement about whether the COLA constitutes part of the participants' "accrued benefit," it is undisputed that all of the "requirements" listed in the legislative history are satisfied in this case. In fact, the legislative history is clear that subsidies provided in addition to the value of the "accrued benefit" are not part of the "accrued benefit."

Moreover, respondent is unable to wrest any support from the IRS announcements quoted at length in his brief. *See* Opp. 19-22. Those IRS announcements explain that, where a plan offers a COLA as a component of the participants' normal retirement benefit, the plan must provide the COLA to a participant who separates from employment before retirement or who selects a lump-sum distribution of benefits. The Rohm and Haas Pension Plan, in contrast, *excludes* the COLA from its participants' normal retirement benefit and provides that the COLA is "an enhancement that is awarded to annuitants, over and above the accrued benefit." Pet. App. 6a. None of the IRS announcements addresses this particular plan structure—and even if they did, they could not alter the unambiguous language of ERISA itself, which looks to the terms of the plan at issue to define the participants' "accrued benefit." *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

Finally, respondent mistakenly contends that a COLA that increases benefits beginning at or after normal retirement age cannot be a retirement-type subsidy because the concept of a retirement-type subsidy refers only to "amounts paid to early retirees above their normal pension benefits." Opp. 17 (internal quotation marks omitted). An early retirement subsidy, however, is only one example of a retirement-type subsidy. *See* Treas. Reg. § 1.411(d)-3(g)(6)(iv) ("*Examples* of retirement-type subsidies include a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity.") (emphasis added). The other example given is a subsidized qualified joint and survivor annuity. By law, a qualified joint and survivor annuity ("QJSA") must be offered at any age a participant is eligible to re-

ceive a distribution under the plan, including at or after normal retirement age. *Id.* § 1.401(a)-20, Q&A-10 ("If a participant is alive on the annuity starting date, the benefits must be payable as a QJSA."). Furthermore, if any form of distribution at that age is subsidized, the qualified joint and survivor annuity must be subsidized as well. *Id.* § 1.401(a)-20, Q&A-16 ("the QJSA must be at least as valuable as any other optional form of benefit payable under the plan at the same time"). Thus, any retirement-type benefit that continues after retirement and that is in excess of the actuarial present value of the participant's "accrued benefit" can be a retirement-type subsidy. *See id.* § 1.411(d)-3(g)(6)(iii), (iv). A COLA that increases benefits beginning after normal retirement age, when identified by the terms of the plan as separate and in addition to a participant's normal retirement benefit, is just such a benefit.[3]

III. The Decision Below Has Far-Reaching Implications For All Defined Benefit Pension Plans.

Nothing in respondent's brief diminishes the exceptional importance of this case for all defined benefit pension plans. The Seventh Circuit's definition of "accrued benefit" enables courts to expand the scope of a plan participant's "accrued benefit" in direct contravention of the terms of the plan. In so doing, the Seventh Circuit's decision upsets the settled funding expectations of plan actuaries and exacerbates the Nation's already serious pension crisis.

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[3] The circuits' widespread and long-standing confusion about the distinction between an "accrued benefit" and a retirement-type subsidy reinforces the compelling need for this Court's review. *See* Br. of the U.S. Chamber of Commerce at 15-16.

Respondent's suggestion (at 23-24) that the legal status of a COLA has only minimal importance to defined benefit pension plans and their participants is resoundingly refuted by the fact that approximately 17% of private-sector retirees receive benefits under a defined benefit pension plan that includes a COLA. Br. of the U.S. Chamber of Commerce at 2 (citing Craig Copeland, *Retirees with Pension Income and Characteristics of Their Former Job*, Notes (Employee Benefit Research Inst.), Feb. 2003, at 5-6). Moreover, the implications of this case extend well beyond the COLA setting, and reach any benefit enhancement that a defined benefit pension plan excludes from its definition of "accrued benefit."

Respondent also tries unsuccessfully to conceal the substantial risk of plan underfunding generated by the Seventh Circuit's decision. While respondent may be correct that "the financial cost to plans is the same whether a participant receives the COLA as part of his accrued benefit . . . or . . . through a discounted lump sum" (Opp. 23), this equivalent "financial cost" does not alter the fact that plans that explicitly exclude the COLA from their definition of "accrued benefit" are funded on the assumption that they will not be required to pay a COLA to participants who select a lump-sum distribution of their benefits. Where a court overrides the plan's terms and holds that *all* plan participants are entitled to the COLA, the plan is faced with the prospect of absorbing this new and unforeseen liability. Because many defined benefit pension plans are already chronically underfunded (*see* Pet. for Writ of Cert. 25), the financial implications of such a unilateral rewriting of plan terms can be devastating for both the plan and its participants.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 19, 2008

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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia
Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS FOR THE APPENDIX

United States Court of Appeal's

Orders, Opinions or Judgments
are located in the Appendix as follows:

October 9, 2007 JUDGMENT w/o Memo..... 1

September 24, 2007 ORDER..... 3

United States District Court's

Orders, Opinions or Judgments
are located in the Appendix as follows:

September 19, 2006 ORDER..... 4

September 20, 2006 Amended Memorandum..... 5

October 23rd, 2006 Memorandum Opinion/Order. 16

November 9th, 2006 ORDER..... 21

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171

September Term, 2007
06cv00022
Filed On: October 9, 2007

Kenneth W. Johnson,
Appellant

v.

Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. The district court correctly concluded that appellant's complaint failed to state a claim upon which relief could be granted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171 September Term, 2007
06cv00022
Filed On: September 24, 2007

[1068846]
Kenneth W. Johnson,
Appellant
v.
Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for oral argument, the response thereto, and the reply, it is

ORDERED that the motion be denied. Oral argument will not assist the court in this case. Accordingly, the court will dispose of the appeal without oral argument on the basis of the record and the presentations in the briefs. See Fed. R. App. P 34(a)(2); D.C. Cir. Rule 34(j).

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motions to dismiss be, and hereby are, GRANTED. The complaint is DISMISSED. It is further

ORDERED that plaintiff's motion to admit videotape evidence and defendant Lee's motion to strike the motion be, and hereby are, DENIED as moot.

This is a final, appealable Order.

SIGNED this 19th day of September, 2006

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 06-22 (RWR)
STACEY LEWIS et al.,	)	
Defendants.	)	

AMENDED MEMORANDUM OPINION

Pro se plaintiff Kenneth W. Johnson has filed an action against several individuals and a law firm, alleging violation of his civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice, and intentional infliction of emotional distress. Each defendant[1] has moved to dismiss the complaint for failure to state a claim.[2] Because Johnson does not

[1] The complaint was dismissed as to defendants Stacy Lewis and Robert Mance because those defendants were not served with a summons and complaint.

[2] Defendants also argue that issue preclusion and the statute of limitations should bar this action. These contentions are without merit. Issue preclusion does not apply here because the events giving rise to the claims against the moving defendants have never before been litigated. The three-year D.C. statute of limitations on personal injury claims, D.C. Code § 12-301(8), which applies here by operation of a Supreme Court decision, Owens v. Okure, 488 U.S. 235, 249-

state a claim under the civil rights statutes, those claims will be dismissed, and supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3).

BACKGROUND

Johnson, a man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European" (Am. Compl. at 6), complains because none of the defendants, all attorneys, agreed to represent him in his pursuit of legal remedies relating to matters that occurred in 1997 when he was arrested, tried, and acquitted in the Superior Court for the District of Columbia.[3] On the basis of these refusals, he alleges race discrimination, legal malpractice, and intentional infliction of emotional distress.

According to Johnson, he approached attorney Jesse Gadson in 2002 about filing a claim

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50 (1989), does not bar this action because Johnson filed this action on January 9, 2006, complaining of events that occurred no earlier than January 15, 2003. See also, Carter v. District of Columbia, 14 F.Supp. 2d 97, 102 (D.D.C. 1998) (stating that plaintiffs in this court "have the right to bring a Section 1981 or a Section 1983 claim at any time within three years of the alleged discrimination").

[3] The complaint itself, exclusive of the five volumes of attached exhibits, is 104 pages long, argumentative, and far from the "short and plain statement of a claim," or "simple, concise and direct" averment that Fed.R.Civ.P. 8(a)(2) and (e) requires.

for post-judgment relief, but Gadson declined and directed Johnson to the public law section of the Library of Congress. (Am. Compl. at 40-41.) Johnson visited Gadson again sometime shortly before January 15, 2003, because Gadson had given him more time and more valuable information than had any other attorney Johnson had contacted. (Id. at 41.) On January 15, 2003, Gadson entered into a contract with Johnson for the limited purpose of "investigat[ing] the possibility of filing a law suit against the District of Columbia government." (Id. at 40, 50 (quoting agreement between Gadson and Johnson).) After conducting the agreed-upon investigation, and viewing additional materials at Johnson's request, Gadson again declined to represent Johnson, expressly because Gadson felt he did not have the experience necessary for the case.4 (Id. at 44.)[4]

According to the amended complaint, in September 2003, Johnson asked Tony Lee, an attorney and partner in the law firm McGuireWoods, LLP,[5] to "provide legal counsel on filing a motion to set aside the prior judgment in Johnson v. District of Columbia . . . C.A. 3837-98 before the Superior Court of the District of

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[4] Johnson, pro se, filed an action against the District of Columbia on June 4, 2003, which was dismissed on a motion to dismiss that was filed in late July 2003, because the claims were time barred. See Johnson v. District of Columbia, Civil Action 03-1218 (CKK) (D.D.C. Oct. 14, 2003).

[5] McGuireWoods is also a defendant, but without stating so, Johnson alleges McGuireWoods' liability by only through the acts of Lee. (See Am. Compl. at 68-78.)

Columbia pursuant to [R]ule 60(b). . . . And asked Tony Lee to have the July 15, 1998 judgment vacated. He refused[]!" (Am. Compl. at 53.) The amended complaint recounts some of the advice Lee gave Johnson and his conclusion that Lee could not help Johnson in his efforts. (Id. at 53-54.) The facts Johnson alleges suggest that Lee made a contract with Johnson and, as agreed, provided legal counsel to him.

Johnson alleges that he spoke to attorney Elbert Shore on April 15, 2004, about Shore entering an appearances in an action Johnson had filed pro se three days earlier captioned Johnson v. Mance, asserting claims relating to events occurring in 1997 and another event occurring in 2004.[6] (Am. Compl. at 66.) Johnson alleges that he paid Shore a $75.00 consultation fee and presented Shore with the facts underlying the Mance action, that Shore asked and was told about Johnson's mixed racial ancestry, and that Shore refused to represent Johnson in the matter. (Id.)

Then, sometime in June 2004, Johnson attempted to engage the legal services of Harold N. Harmon and Robert F. Condon. Johnson "offered his [pending *pro se*] lawsuit against Robert Mance" to Harmon and Condon and told them of the facts

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[6] On August 6, 2004, the complaint was dismissed because the claims pled either failed to state a claim upon which relief could be granted or were barred by the statute of limitations. See Mem., Johnson v. Mance, Civil Action No. 04-591 (JR) (D.D.C. Aug. 5, 2004).

in the case. (Id. at 62.) A motion to dismiss in that case had been filed on June 7, 2006. Harmon and Condon later sent Johnson a retainer agreement, but before the agreement reached Johnson, the case was dismissed. (Id.) After Johnson informed Harmon and Condon that the case had been dismissed, they responded in a letter: "Please be advised that we will not be able to represent you in your case that was dismissed by Judge Robertson in the U.S. District Court or in your current Motion for Summary Reversal filed in the U.S. Court of Appeals for the District of Columbia." (Id.)

Johnson alleges that the defendants' refusals were racially discriminatory and deprived him of his civil rights in violation of 42 U.S.C. §§ 1981 and 1983. He also alleges that these same refusals constituted legal malpractice and the intentional infliction of emotional distress, in violation of state common law.

DISCUSSION

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). A "complaint should not be dismissed unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. . . To that end, the complaint is construed liberally

in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. . . . However, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citations omitted).

I. THE FEDERAL CIVIL RIGHTS CLAIMS

A. Claim for discrimination under 42 U.S.C. § 1981

Johnson alleges that all defendants violated § 1981 when they "refused to either make or enforce a contract with Johnson, because Johnson is a predominately Caucasian U.S. Citizen, who has scant physical evidence of any African blood or ancestry . . . ." (Am. Compl. at 6.) Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Johnson claims that the black defendants — who are not identified — have discriminated against him because he appears white. (Am. Compl. at 6.) He also alleges that white defendants — who are not identified — have discriminated against him because although he appears white, they knew of his black ancestry. (Id.) The only defendant Johnson alleges knew of his black ancestry is Elbert Shore. (Id. at 66.)

Johnson infers race-based discrimination by all the defendants, but for each defendant, that inference enjoys no support from the facts Johnson pleads. First, Johnson alleges that he was perceived as a white citizen by all defendants except Shore, who knew of his black ancestry. (Am. Compl. at 6, 66.) White plaintiffs certainly may sue under § 1981. However, because § 1981 entitles all persons to the same contracting rights as are "enjoyed by white citizens," Johnson's allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981. See MacInstosh v. Building Owners & Managers Ass'n Intern., 355 F. Supp. 2d 223, 226 (D.D.C. 2005) (discussing how although a § 1981 plaintiff need not be a person of color, the conduct complained of must involve some racially motivated differentiation (citing Glymph v. District of Columbia, 211 F. Supp. 2d 152, 154 (D.D.C. 2002))).

Second, other facts Johnson alleges do not support an inference of race-based discrimination as to any of the defendants, including Shore. Johnson pleads facts that establish that each defendant met with Johnson, agreed to evaluate his case and then, only after evaluating the merits of Johnson's case, declined to provide representation. In the case of each defendant, the facts Johnson pleads demonstrate that each defendant was either willing to (Harmon & Condon), or did (Gadson, Lee, Shore), make a contract with

Johnson, some only for the limited purpose of evaluating or providing legal advice on the efficacy of pursuing a claim.[7] In the case of each defendant, the facts Johnson alleges reflect that the representation was declined for professional (Gadson) or legal (Lee, Shore, Harmon & Condon) reasons. Even with respect to Shore, Johnson's allegations do not support an inference of race based discrimination in contracting. Shore agreed to provide a legal consultation and did so. Then, after learning of the facts of the case, he declined to represent Johnson in the already filed Johnson v. Mance action.

In short, Johnson's factual allegations do not support an inference of race-based discrimination. The only suggestions of race-based conduct in the complaint are the sweeping and factually unsupported conclusions asserted by Johnson. Such conclusions, devoid of factual support, are not credited on a motion to dismiss. Kowal, 16 F.3d at 1276 (noting that a court is not required to "accept legal conclusions cast in the form of factual allegations"). Accordingly, the § 1981 claim as to each defendant will be dismissed for failure to state

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[7] Johnson appears to harbor the belief that if he pays an attorney for legal advice and then wants to pursue a course of action against legal advice, that he can command an attorney to represent him. This is not necessarily so. An attorney is both a professional and an officer of the court who is not only entitled, but also obligated, to use his professional legal judgment in accord with his ethical responsibilities to decline to make arguments or representations that are not supported in either fact or law.

a claim upon which relief may be granted. Fed. R. Civ. P. 2(b)(6).

B. Claim for discrimination under 42 U.S.C. § 1983

Johnson alleges that the defendants' refusals to represent him in his pursuit of legal remedies violated § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." "To state a claim under section 1983, a plaintiff must allege both (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted 'under color of' the law of a state, territory or the District of Columbia." Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).

First, as was true with Johnson's § 1981 claims, Johnson does not make factual allegations that reflect that he was deprived of any right secured by federal law. Second, Johnson does not allege that the defendants were state officials,[8] or

[8] An attorney licensed to practice law is not acting under color of law by dint of his membership in the bar and status as an

that they conspired with state officials or willfully engaged in joint activity with a state or its agents in their refusal to represent Johnson. See id. Accordingly, Johnson's allegations do not state a claim for which relief may be granted under 42 U.S.C. § 1983 and that claim will be dismissed as to each defendant.

II. THE STATE COMMON LAW CLAIMS

If "the district court has dismissed all claims over which it has original jurisdiction," the court may decline to exercise supplemental jurisdiction over remaining state law claims.[9] 28 U.S.C. § 1367(c)(3). Accordingly, supplemental jurisdiction over Johnson's state common law claims will be declined and those claims will be dismissed for lack of jurisdiction.

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officer of the court. See Polk v. Dodson, 454 U.S. 312, 318 (1981); Van Daele v. Vinci, 294 F. Supp. 71, 74 (N.D. Ill. 1968)("Merely acting under a state license is not state action within the context of the civil rights acts."); Sullivan v. Stein, No. Civ. 3:03 CV 1203 (MRK), 2004 WL 1179351, *11 (D. Conn. May 21,2004) ("It is well-settled . . . that private attorneys do not act under color of state law and are not state actors simply by virtue of their state-issued licenses to practice law.").

[9] Johnson asserts diversity jurisdiction. (See Compl. at 3; Am. Compl. at 3.) However, he fails to plead complete diversity of citizenship, and the face of the complaint (and of the amended complaint) reflect an absence of complete diversity. Both Johnson and defendant Shore have addresses in Maryland and Maryland citizenship has not been disputed. Thus, there is no diversity jurisdiction over this action under 28 U.S.C. § 1332(a).

CONCLUSION

Because Johnson's factual allegations do not state a claim under the civil rights statutes, those claims will be dismissed. Because supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3), those claims will be dismissed. Because the complaint will be dismissed, the two pending motions relating to admission of evidence will be denied as moot. A final, appealable Order accompanies this memorandum Opinion.

SIGNED this 20th day of September, 2006.

/s/
RICHARD W. ROBERTS
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 06-22 (RWR)**
	)	
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Kenneth W. Johnson has filed motions to reconsider and vacate an order dismissing his complaint. He has also filed a motion to admit evidence of his current and intended future domicile related to the issue of diversity jurisdiction. Because Johnson does not identify any reason with legal merit to reconsider or vacate the order, and because the offered evidence would not remedy the flaw in diversity jurisdiction, his motions will be denied.

BACKGROUND

Johnson filed a complaint asserting federal question, supplemental and diversity jurisdiction, and alleging violations of his federal civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice and intentional infliction of emotional

distress. The federal civil rights claims were dismissed for failure to state a claim upon which relief could be granted. The common law claims were dismissed because the complaint did not establish diversity jurisdiction and supplemental jurisdiction was declined. See Memorandum Opinion & Order, Sept. 19, 2006. Johnson has moved for relief from the dismissal under Fed. R. Civ. P. 59(e) and 60(b)(2), and to admit evidence of his current and intended future domicile.

DISCUSSION

I. MOTIONS FOR RECONSIDERATION AND TO ADMIT DOMICILE EVIDENCE

A motion for reconsideration under Fed. R. Civ. P. 59 is not intended to provide a vehicle to reargue facts already presented. Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Rather, such a motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Id. at 758 (quotation marks and citation omitted).

Johnson contends that his complaint did not fail to state a claim upon which relief may be granted. (Pl.'s Mot. for Reconsideration at 1.) His argument, however, focuses primarily on his legal malpractice allegations, about which no finding

was made with respect to the sufficiency of the pleading. (Id. at 2-5.) Johnson has not identified a basis for reconsidering the decision as to the federal civil rights claims. He has, at the most, reargued facts already presented.

Johnson also argues in his motion for reconsideration that diversity jurisdiction exists. (Id. at 1.) In support of that argument, and attached to a motion to admit evidence, he filed an affidavit and documents demonstrating that he lives in Maryland and intends to remain domiciled in Maryland, and that at least one of the defendants is a Virginia citizen. Johnson's arguments and evidence do not meet the test of diversity jurisdiction, as diversity jurisdiction cannot be established on the basis of the citizenship of the plaintiff and one of multiple defendants. Diversity jurisdiction requires complete diversity between adversaries at the time the suit is filed, such that no defendant may be a citizen of the state of which any plaintiff is a citizen. [1] See Saadeh v. Farouki, 107 F.3d 52, 54-55 (D.C. Cir. 1997) (stating that "'federal diversity jurisdiction is lacking if there are any litigants from the same state on opposing sides.'" (citing Prakash v. American Univ., 727 F.2d 1174, 1178 n.25 (D.C. Cir. 1984)).

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[1] Johnson's point that defendant Elbert Shore, whose address on the face of the complaint was listed as Maryland, was not involved in the series of events giving rise to the asserted cause of action until April 15, 2004, is irrelevant. (Pl.'s Mot.for reconsideration at 13-14.)

MOTION TO VACATE

A motion for relief from a judgment or order may be based upon newly discovered evidence. Fed. R. Civ. P. 60(b)(2). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. Johnson argues that newly discovered evidence relating to his legal malpractice claims previously brought in Superior Court warrants granting his Rule 60(b)(2) motion. (Pl.'s Mot. to Vacate at 1.) What Johnson erroneously characterizes as newly discovered evidence is a memorandum opinion and judgment of the District of Columbia Court of Appeals issued September 28, 2006, affirming the District of Columbia Superior Court's orders denying Johnson's motions under Super. Ct. Civ. R. 60(b) in which Johnson asserted that his adversary had committed fraud upon the court. (See Mem. Op. & J., Johnson v. District of Columbia, Nos. 04-CV-115 and 04-CV-442 (D.C. Ct. App. Sept. 28, 2006) at 1 ("The trial court found no merit to the claims of fraud, and neither do we. We accordingly affirm.").) The decision of the appeals court does not constitute newly discovered evidence relevant to the federal civil rights claims, or any other claims, that Johnson asserted in his complaint in this case.

CONCLUSION AND ORDER

Because Johnson has not identified a sound legal basis for either reconsidering or vacating the order dismissing his complaint, and because the evidence he offered will not alter the conclusion that diversity jurisdiction was not established, Johnson's motions will be denied. Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to vacate the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to admit evidence be, and hereby is, DENIED.

SIGNED this 23rd day of October, 2006.

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
Plaintiff,	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
Defendants.	)	
	)	

ORDER

Plaintiff Kenneth W. Johnson has filed a motion seeking reconsideration of an order dated October 23, 2006 that denied Johnson's motion to vacate an order dismissing his complaint. Johnson's motion attempts to reargue facts and legal arguments already presented, but a motion for reconsideration under Fed. R. Civ. P. 59 is not a vehicle to reargue facts and argument already presented. See Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the October 23, 2006 order be, and hereby is, DENIED.

SIGNED this 9th day of November, 2006.

/s/
RICHARD W. ROBERTS
United States District Judge

MOTION FILED
FEB 8 - 2008

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(3)

No. 07-906

IN THE

Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS,
Individually and on Behalf of Others Similarly Situated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 8, 2008

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1. The Chamber of Commerce of the United States of America ("Chamber") respectfully moves for leave to file an *amicus curiae* brief in support of Petitioner. All parties have received timely notice of the Chamber's filing of this brief, to which Petitioner has consented. Counsel for Respondent declined to consent to the Chamber's filing, thus necessitating this motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

2. The Chamber is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations.

3. A principal function of the Chamber is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

4. Many of the Chamber's members sponsor and maintain defined benefit pension plans and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.

5. Thus, the Chamber has participated as *amicus curiae* and advocated on behalf of the business community in numerous cases before this Court that have involved the interpretation of ERISA. *See, e.g.*, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (U.S. argued Nov. 26, 2007); *Beck v. PACE Int'l Union*, 127 S. Ct. 2310 (2007); *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

6. This case concerns the question whether a cost-of-living adjustment in a defined benefit plan is a *per se* "accrued benefit" under ERISA, 29 U.S.C. § 1002(23)(A). The question presented directly implicates the Chamber's interest in the correct and uniform interpretation of the obligations that ERISA imposes on sponsors of defined benefit plans.

7. For these reasons and those set out in the brief, the Chamber respectfully moves this Court to allow it to file this *amicus curiae* brief urging the Court to grant the petition for a writ of certiorari and to reverse the judgment below.

Respectfully submitted,

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TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF i

TABLE OF AUTHORITIES iv

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER 1

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES THE POLICIES UNDERLYING ERISA AND CREATES UNCERTAINTY FOR SPONSORS OF DEFINED BENEFIT PENSION PLANS REGARDING THEIR FUNDING OBLIGATIONS 5

II. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES ERISA'S DEFINITION OF AN "ACCRUED BENEFIT" AND EXACERBATES EXISTING CONFUSION AMONG THE LOWER COURTS ABOUT THE IMPORTANT STATUTORY DISTINCTION BETWEEN ACCRUED BENEFITS AND RETIREMENT-TYPE SUBSIDIES 10

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 7, 8

American Stores Co. v. American Stores Co. Retirement Plan, 928 F.2d 986 (10th Cir. 1991) 12

Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516 (3d Cir. 1988) 13

Beck v. PACE International Union, 127 S. Ct. 2310 (2007) i

Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990) 12

Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003) 6

Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner, 318 F.3d 599 (4th Cir. 2003) 11

Cattin v. General Motors Corp., 955 F.2d 416 (6th Cir. 1992) 12

Central Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) 7

Costantino v. TRW, Inc., 13 F.3d 969 (6th Cir. 1994) 15

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001) 9

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 7

TABLE OF AUTHORITIES
(continued)

Page

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 10

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) i

Hein v. FDIC, 88 F.3d 210 (3d Cir. 1996) 16

Herman v. Central States, Southeast & Southwest Areas Pension Fund, 423 F.3d 684 (7th Cir. 2005) 16

Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988) 12

LaRue v. DeWolff, Boberg & Associates, Inc., No. 06-856 (U.S. argued Nov. 26, 2007) i

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 6

Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 221 F.3d 1235 (11th Cir. 2000) 15

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 10

Perreca v. Gluck, 295 F.3d 215 (2d Cir. 2002) 16

San Diego AFL-CIO Bus Drivers Local Division 1309 v. San Diego Transit Corp., 26 F.3d 132 (9th Cir. 1994) 11

Sereboff v. Mid Atlantic Medical Services, 547 U.S. 356 (2006) i

Spacek v. Maritime Ass'n, ILA Pension Plan, 134 F.3d 283 (5th Cir. 1998) 16

TABLE OF AUTHORITIES
(continued)

Page

Steiner Corp. Retirement Plan v. Johnson & Higgins of California, 31 F.3d 935 (10th Cir. 1994) 16

Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406 (4th Cir. 1983) 12

STATUTES AND LEGISLATIVE MATERIALS

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ..... *passim*

29 U.S.C. § 1002 ..... *passim*

29 U.S.C. § 1053 14

29 U.S.C. § 1054 ..... 4, 14, 15, 16

29 U.S.C. §§ 1081-1085 8

H.R. Rep. No. 109-232, pt. 2, at 108 (2005) 6

REGULATIONS

26 C.F.R. § 1.411 ..... 12, 13

Measurement of Assets and Liabilities for Pension Funding Purposes, 72 Fed. Reg. 74,215, 74,223 (proposed Dec. 31, 2007) (if adopted, to be codified at 26 C.F.R. § 1.430(d)-1(d)) 8

OTHER

Actuarial Standard of Practice No. 4, § 3.5 (Actuarial Standards Bd. 2007) 8

TABLE OF AUTHORITIES
(continued)

Page

Jeffrey R. Brown, *How Should We Insure Longevity Risk in Pensions and Social Security?*, An Issue in Brief (Ctr. for Ret. Research at Boston Coll.), Aug. 2000 5

Jeffrey R. Brown & Mark J. Warshawsky, *Longevity-Insured Retirement Distributions from Pension Plans: Market and Regulatory Issues* (Nat'l Bureau of Econ. Research, Working Paper No. 8064, 2001) 5

Craig Copeland, *Retirees with Pension Income and Characteristics of Their Former Job*, Notes (Employee Benefit Research Inst.), Feb. 2003 2

Statement of Financial Accounting Standards No. 87 (Fin. Accounting Standards Bd. 1985) 8, 9

Supreme Court Rule 37 ..... i, 1

U.S. Dep't of Labor, Advisory Council on Employee Welfare & Pension Benefits, Report of the Working Group on Retirement Plan Leakage: "Are We Cashing Out Our Future?" (1998), *available at* http://www.dol.gov/ebsa/adcoun/leaknew1.htm 6

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court that have raised issues of vital concern to the Nation's businesses, including cases construing the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.

Many of the Chamber's members sponsor and maintain defined benefit pension plans governed by ERISA. The Chamber thus has a strong interest in the proper interpretation of the obligations that ERISA imposes on plan sponsors. In addition, the Chamber has long advocated national uniformity in federal law. The predictability engendered by a uniform federal legal scheme promotes efficient

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received notice at least 10 days prior to the due date of the filing of this brief, to which Petitioner has consented. Counsel for Respondent declined to consent to this filing, thus necessitating the foregoing motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

business operations, especially in the area of ERISA plan design and administration, and protects businesses against the costs and risks of navigating a maze of inconsistent interpretations of federal laws.

The question presented in this case—whether a cost-of-living adjustment ("COLA") that a defined benefit pension plan has discretion to provide to participants who elect to receive monthly annuities constitutes a *per se* accrued benefit under ERISA, 29 U.S.C. § 1002(23)(A), and therefore must also be provided to participants who choose to receive their benefits in a one-time lump-sum distribution—directly implicates the Chamber's interests in the correct and uniform interpretation of ERISA's requirements. Indeed, numerous private pension plans have COLAs like that in the Rohm and Haas Plan. *See* Craig Copeland, *Retirees with Pension Income and Characteristics of Their Former Job*, Notes (Employee Benefit Research Inst.), Feb. 2003, at 5-6 (noting that approximately 17% of private-sector retirees (and 55% of public-sector retirees) receive benefits under a defined benefit pension plan that includes an automatic COLA).

The Chamber and its members thus have a strong interest in the Court's granting plenary review and correcting the erroneous judgment of the court below.

SUMMARY OF ARGUMENT

The Seventh Circuit's conclusion that a COLA is a *per se* accrued benefit contravenes both the policies underlying ERISA and the statute's plain language.

1. The decision below will have adverse consequences for pension plan sponsors and participants alike. *First*, it eliminates an incentive for participants to choose monthly annuities instead of a lump-sum distribution, contrary to the public interest in ensuring that retirees have guaranteed lifetime income. *Second*, by subjecting plan sponsors to financial obligations greater than those that they assumed under the terms of a plan, the Seventh Circuit's decision increases the risk that plan sponsors will choose not to offer COLAs in the first place. *Third*, the Seventh Circuit's decision upsets the settled funding and corporate accounting expectations of plan sponsors, whose actuaries must rely on the terms of a plan in conducting financial accounting and ERISA-mandated funding valuations. Fourth, the decision below is at odds with decisions of the Fourth and Ninth Circuits, thereby subjecting plan sponsors to inconsistent obligations regarding plan funding and contravening ERISA's goal of creating a uniform national scheme to govern plan administration.

2. The Seventh Circuit's decision also contravenes the statutory language of ERISA and exacerbates the confusion among the courts of appeals concerning the statutory distinction between accrued benefits and retirement-type subsidies.

ERISA defines an "accrued benefit" as "the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual

benefit *commencing at normal retirement age . . . .*" 29 U.S.C. § 1002(23)(A) (emphasis added). A COLA falls outside the definition of an accrued benefit because, by its very nature, it does not commence *at* normal retirement age.

Rather than being an accrued benefit, the COLA in the Rohm and Haas Plan is a retirement-type subsidy—*i.e.*, it is a supplement in excess of "the actuarial equivalent of the normal retirement benefit"—paid only to participants who chose to receive monthly annuities. The distinction between an accrued benefit and a retirement-type subsidy has significant legal consequences. While both forms of benefit are subject to ERISA's anti-cutback protection, *see* 29 U.S.C. § 1054(g)(1), (2), ERISA otherwise regulates accrued benefits far more extensively than it does retirement-type subsidies, and in particular requires only that the present value of an accrued benefit, not retirement-type subsidies, be paid to participants who elect a lump-sum distribution.

Like the Seventh Circuit, other courts of appeals have also conflated these benefit concepts. The decision below exacerbates that confusion among the lower courts and imposes liability costs on plans that ERISA does not mandate and that plan sponsors have not anticipated. This Court should grant the petition for certiorari and reverse the erroneous judgment of the Seventh Circuit.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES THE POLICIES UNDERLYING ERISA AND CREATES UNCERTAINTY FOR SPONSORS OF DEFINED BENEFIT PENSION PLANS REGARDING THEIR FUNDING OBLIGATIONS.

The decision below undermines the policies underlying ERISA and will have adverse consequences for both pension plan sponsors and participants in several important respects.

First, the decision below contravenes sound retirement planning by making lump-sum distributions more attractive relative to monthly retirement annuities. By "offer[ing] retirees the opportunity . . . for a lifelong stream of guaranteed income," annuitization solves the problem of "longevity risk, or the risk that [a retiree] will live significantly beyond her expected life span and thus run out of money." Jeffrey R. Brown, *How Should We Insure Longevity Risk in Pensions and Social Security?*, An Issue in Brief (Ctr. for Ret. Research at Boston Coll.), Aug. 2000, at 1, 5 (emphasis removed). Academics and public policy experts have therefore long advocated greater reliance on annuities as a part of sound retirement policy. *See id.*; Jeffrey R. Brown & Mark J. Warshawsky, *Longevity-Insured Retirement Distributions from Pension Plans: Market and Regulatory Issues* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 8064, 2001) ("Yaari (1965) was the first to demonstrate the economic value of annuitization in a life cycle model with uncertain lifetimes . . . .").

Indeed, noting that lump-sum distributions "encourage[] spending rather than saving," an Advisory Council convened by the Department of Labor recommended in 1998 that annuities be the primary form of distribution for retirement benefits. *See* U.S. Dep't of Labor, Advisory Council on Employee Welfare & Pension Benefits, Report of the Working Group on Retirement Plan Leakage: "Are We Cashing Out Our Future?" (1998), *available at* http://www.dol.gov/ebsa/adcoun/leaknew1.htm. So, too, the Report of the House Ways and Means Committee, in connection with the Pension Protection Act of 2005, noted that "discouraging annuitization" in favor of "lump-sum distributions . . . may reduce retirement income security" and "lead[] to a drain on pension plan assets, which can undermine the [interests] of other plan participants." H.R. Rep. No. 109-232, pt. 2, at 108 (2005). By compelling pension plans that offer COLAs to monthly annuitants to also pay the present value of the COLA as part of a lump-sum distribution, the Seventh Circuit's decision removes a significant incentive for participants to choose annuities, thereby contravening sound public policy.

Second, by failing to adhere to the bedrock principle that a participant's entitlement to benefits under an ERISA-governed plan is to be determined in accordance with the terms of the plan, the Seventh Circuit's decision ultimately harms plan sponsors and participants alike. "Nothing in ERISA requires employers to establish employee benefits plans" or to offer a particular "kind of benefits . . . if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003)

(explaining that "employers have large leeway to design [ERISA] plans as they see fit"); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) (explaining that "private parties, not the Government, control the level of benefits" offered by an ERISA plan in the first instance). Thus, while ERISA "protect[s] employees' justified expectations of receiving the benefits their employers promise them," *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004), the statute also protects plans and plan sponsors by looking to the terms of the plan when defining a participant's entitlement to benefits, and when defining "accrued benefit[s]" in particular, 29 U.S.C. § 1002(23)(A). *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).. In this way, the statute ensures that employers do not face liability for financial obligations greater than those that they chose to assume and expressly memorialized in the terms of an ERISA plan.

The Seventh Circuit's decision, however, imposes by judicial fiat the requirement that a COLA be paid to participants who choose a lump-sum distribution whenever a plan also provides a COLA to those who elect a monthly annuity, notwithstanding the express language in the Rohm and Haas Plan that a COLA is available to monthly annuitants only. By rewriting the terms of the Plan, the Seventh Circuit's decision makes it more likely that plan sponsors will choose not to offer COLAs in the first instance.

Third, the Seventh Circuit's conclusion that a COLA is a *per se* accrued benefit under ERISA upsets the settled funding expectations and corporate accounting responsibilities of sponsors of defined benefit pension plans. ERISA requires the sponsors of defined benefit plans to adhere to strict minimum

funding requirements in order to ensure the solvency of the plans. *See* 29 U.S.C. §§ 1081-1085; *see also Alessi*, 451 U.S. at 510 n.5 (describing ERISA's minimum funding requirements). Moreover, corporate plan sponsors are required to account for the financial impact of their plans in accordance with Financial Accounting Standards Statement No. 87 ("FAS 87"), one of the rules promulgated by the Financial Accounting Standards Board. *See* Statement of Fin. Accounting Standards No. 87 (Fin. Accounting Standards Bd. 1985).

In determining the amount of funding needed to satisfy ERISA's requirements, actuaries are required to assess a plan's liabilities based on the design features of the plan as memorialized in the written plan documents. *See* Actuarial Standard of Practice No. 4, § 3.5 (Actuarial Standards Bd. 2007) (instructing actuaries to "measur[e] pension obligations and determin[e] plan costs or contributions" taking into account "plan provisions"); *see also* Measurement of Assets and Liabilities for Pension Funding Purposes, 72 Fed. Reg. 74,215, 74,223 (proposed Dec. 31, 2007) (if adopted, to be codified at 26 C.F.R. § 1.430(d)-1(d)) ("[T]he determination of a plan's funding target and target normal cost for a plan year is based on plan provisions that are adopted no later than the valuation date for the plan year and that become effective during that plan year."). Likewise, FAS 87 "requires use of the terms of the pension plan itself" to determine corporate expenses resulting from the plan. FAS 87, ¶ 14.

But under the Seventh Circuit's holding, a COLA is a *per se* accrued benefit—regardless of unambiguous pension plan language that a COLA is

excluded from the definition of "accrued benefit" and is unavailable when participants choose a lump-sum pension distribution. That holding imposes new and unforeseen liabilities on plans and plan sponsors whose actuaries, as required by actuarial standards of practice and FAS 87, anticipated funding requirements and corporate liabilities based on the terms of the pension plan. More specifically, by essentially rewriting the terms of pension plans like the Rohm and Haas Plan, the Seventh Circuit's decision forces actuaries and accountants to recalculate the amount of projected lump-sum pension distributions by including the value of COLAs. This will cause all private pension plans that have COLAs, but distinguish between COLAs in an annuity and a lump-sum form of pension, to necessarily have greater pension funding liability and corporate accounting expense than their sponsors had forecast.

Fourth, the Seventh Circuit's decision contravenes ERISA's goal of facilitating "nationally uniform plan administration." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001). The conflict between the Seventh Circuit and the Fourth and Ninth Circuits over whether a COLA is a *per se* accrued benefit vastly complicates the determination of whether a plan is adequately funded to cover its liabilities, an inquiry that now depends on different standards in different circuits. *See* Pet. at 11-23 (describing how the Seventh Circuit's *per se* definition of an accrued benefit conflicts with the case-by-case approach of the Fourth and Ninth Circuits). This Court's review is needed to restore "a uniform administrative scheme [that] provides a set of standard procedures" for determining plan liabilities and funding

requirements. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); *see also N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (explaining that Congress intended that ERISA would ensure that "'plans and plan sponsors [are] subject to a uniform body of benefits law'") (citation omitted).

In sum, the Seventh Circuit's decision undermines sound retirement policy by encouraging lump-sum distributions over annuitization; increases the risk that employers will choose not to offer COLAs; imposes new and unanticipated financial obligations on plan sponsors; and creates substantial uncertainty regarding the funding requirements for defined benefit pension plans and the corporate liabilities incurred by plan sponsors. This Court's review of the lower court's decision is warranted.

II. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES ERISA'S DEFINITION OF AN "ACCRUED BENEFIT" AND EXACERBATES EXISTING CONFUSION AMONG THE LOWER COURTS ABOUT THE IMPORTANT STATUTORY DISTINCTION BETWEEN ACCRUED BENEFITS AND RETIREMENT-TYPE SUBSIDIES.

Not only does the Seventh Circuit's decision have adverse policy implications, but it also contravenes ERISA's statutory text and further confuses the state of the law among courts of appeals concerning the distinction between accrued benefits and retirement-type subsidies.

ERISA defines an "accrued benefit" "in the case of a defined benefit plan [as] the individual's accrued benefit *determined under the plan* and . . . expressed

in the form of an annual benefit *commencing at normal retirement age* . . . ." 29 U.S.C. § 1002(23)(A) (emphasis added). As the Petition explains, the Seventh Circuit's decision contravenes this definition and creates a circuit split with decisions of the Fourth and Ninth Circuits by holding categorically that a COLA is an accrued benefit under ERISA, even if the terms of the plan expressly exclude the COLA from the plan's definition of accrued benefits. *See* Pet. at 11-23. Consistent with the text of the statute, the Fourth and Ninth Circuits have engaged in a case-by-case inquiry, dependent on the terms of the plan at issue, to determine whether a COLA or other form of benefit is an "accrued benefit." *See Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599 (4th Cir. 2003); *San Diego AFL-CIO Bus Drivers Local Div. 1309 v. San Diego Transit Corp.*, 26 F.3d 132 (9th Cir. 1994) (unpublished mem.).

In addition, the Seventh Circuit's decision merits this Court's review for another independent reason: The very nature of a COLA is facially inconsistent with the statutory definition of an "accrued benefit" because a COLA does not "*commenc[e]* at normal retirement age." 29 U.S.C. § 1002(23)(A) (emphasis added). Under the Rohm and Haas Plan, the only benefit that commences at normal retirement age is the basic form of pension, *i.e.*, the participant's level life annuity. The COLA in the Plan is an upward "annual adjustment to monthly payments from the Plan," providing "a benefit enhancement" that is "intended to keep pace with inflation." Pet. App. at 68a-69a. Thus, a participant receives a COLA, at the earliest, the year after retiring, and even then only if there has been an intervening increase in the cost of

living after a person's commencement of monthly pension payments such that the Plan supplements the initial monthly amount. Because a participant does not begin to receive a COLA until *after* "commencing . . . retirement," a COLA does not fall within the statutory definition of an "accrued benefit," which must necessarily "commenc[e] at normal retirement age." 29 U.S.C. § 1002(23)(A); *see also* 26 C.F.R. § 1.411(d)-3(g)(3) (defining "annuity commencement date" as "the annuity starting date," or, "in the case of a retroactive annuity starting date . . . the date of the first payment of benefits pursuant to a participant election of a retroactive annuity starting date").

The Seventh Circuit's treatment of a COLA as a *per se* accrued benefit is in tension with decisions of the Third, Fourth, Sixth, and Tenth Circuits, which have properly interpreted the requirement that an "accrued benefit" must "commenc[e] at normal retirement age," 29 U.S.C. § 1002(23)(A), in accordance with ERISA's plain language. These courts have explained that various forms of benefits that commence before, rather than at, normal retirement age are not accrued benefits. *See, e.g.*, *Cattin v. Gen. Motors Corp.*, 955 F.2d 416, 423 (6th Cir. 1992); *Am. Stores Co. v. Am. Stores Co. Ret. Plan*, 928 F.2d 986, 990 (10th Cir. 1991); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918 (3d Cir. 1990); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 284 (3d Cir. 1988); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983). Similarly, a COLA that commences *after* normal

retirement age cannot be an accrued benefit, contrary to the Seventh Circuit's conclusion.[2]

Rather than being an accrued benefit, the COLA in the Rohm and Haas Plan is a retirement-type subsidy—*i.e.*, a supplement in excess of "the actuarial equivalent of the normal retirement benefit"—paid only to participants who chose to receive monthly annuities. *Ashenbaugh v. Crucible Inc., 1975 Salaried Ret. Plan*, 854 F.2d 1516, 1521 n.6 (3d Cir. 1988). Indeed, the benefit sought by Respondent—the lump-sum value of the pension annuity as enhanced by the addition of the COLA—is necessarily greater than the actuarial present value of the level life annuity that commenced at normal retirement. Thus, a COLA falls squarely within the definition of a retirement-type subsidy established by Treasury regulations. *See* 26 C.F.R. § 1.411(d)-3(g)(6)(iv) (defining "retirement-type subsidy" to mean "the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date").

The Seventh Circuit's error in treating a COLA as an accrued benefit rather than a retirement-type subsidy has significant consequences. To be sure, ERISA provides some protection to both accrued benefits and retirement-type subsidies. But where it does so, ERISA recognizes that a retirement-type

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[2] Even to the extent that a pension plan were to allow early retirement prior to normal retirement age, and commencement of pension payments at that earlier date, the COLA supplement still would not commence at normal retirement but necessarily at least a year following the early retirement date.

subsidy is distinct from an accrued benefit. Specifically, both an accrued benefit and a retirement-type subsidy are subject to ERISA's anti-cutback protection, which prohibits a pension plan amendment that reduces or eliminates certain types of benefits once offered in the pension plan document. *See* 29 U.S.C. § 1054(g)(1) (providing anti-cutback protection for accrued benefits); § 1054(g)(2) (providing that, for purposes of anti-cutback protection, a retirement-type subsidy, early retirement benefit, or optional form of benefit "shall be treated as" an accrued benefit). In addition, an administrator of a defined benefit plan is required to provide a detailed notice to each individual affected by an amendment that otherwise lawfully reduces the rate of future benefit accruals or the plan participant's ability to obtain a future retirement-type subsidy. *See* § 1054(h)(1) (requiring notice of reduction in rate of future benefit accruals); § 1054(h)(9) (providing that for purposes of this notice requirement, reduction of a retirement-type subsidy or early retirement benefit "shall be treated as having the effect of reducing the rate of future benefit accrual").

But otherwise, ERISA regulates accrued benefits and retirement-type subsidies distinctly. For example, once vested, an employee's right to an accrued benefit is nonforfeitable. *See* § 1053(a). In addition, ERISA imposes minimum standards on the rate by which accrued benefits must be earned in defined benefit plans. *See* § 1054(b)(1). Finally, and as was at issue in this case, a pension paid to a retiree in the form of a lump sum must equal at least the actuarial present value of such retiree's accrued

benefit. *See* § 1054(c)(3); *see also Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1251-52 (11th Cir. 2000).

None of these statutory protections apply to a "retirement-type subsidy." Thus, *only* the pension plan participant's accrued benefit, and not a retirement-type subsidy, must be paid when the participant chooses a lump-sum form of pension distribution. *See* 29 U.S.C. § 1054(c)(3).

Accordingly, if a plan sponsor provides for a COLA to be added to the monthly annuity form of pension benefit that begins at normal retirement, the anti-cutback protection afforded by § 1054(g) prohibits the pension plan sponsor from later amending the plan to eliminate the COLA from the annuity form of pension benefit. However, because a COLA merely receives the lesser statutory protection of a retirement-type subsidy and *not* the greater statutory protection afforded an accrued benefit, if a plan (like that offered by Rohm and Haas) unambiguously provides that a lump-sum distribution shall not include the value of a COLA, ERISA imposes no obligation to provide it.

Some courts of appeals have properly understood the critical distinction between accrued benefits and the category of benefits afforded lesser protections, which includes retirement-type subsidies, early retirement benefits, and optional forms of benefits. *See, e.g., Costantino v. TRW, Inc.*, 13 F.3d 969, 979-80 (6th Cir. 1994) (recognizing the distinction between "the *definition* of 'accrued benefits'" and ERISA's "strategy of protecting [retirement-type] subsidies by *treating* them as 'accrued benefits' in

several provisions"); *Steiner Corp. Ret. Plan v. Johnson & Higgins of Cal.*, 31 F.3d 935, 939 (10th Cir. 1994).

More commonly, however, courts—as in the decision below—have improperly conflated these two distinct categories of benefits. *See, e.g., Herman v. Cent. States, Se. & Sw. Areas Pension Fund*, 423 F.3d 684, 691 (7th Cir. 2005) (describing early retirement benefits as "'accrued benefits' within the meaning of ERISA") (citation omitted); *Perreca v. Gluck*, 295 F.3d 215, 228 (2d Cir. 2002) (referring to "an optional form of benefit, which includes lump sum payments," as an "accrued benefit"); *Hein v. FDIC*, 88 F.3d 210, 217 (3d Cir. 1996) (stating that § 1054(g)(2) "mandates *accrual*' of early retirement benefits) (emphasis added); *Spacek v. Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283, 291 n.9 (5th Cir. 1998) (noting prior Fifth Circuit precedent concluding that "benefits protected by § 1054(g)(2) are 'vested or accrued'").

Thus, not only is the Seventh Circuit's decision wrong as a matter of statutory interpretation, but it exacerbates the existing confusion among the courts of appeals about the difference between accrued benefits and retirement-type subsidies (as well as early retirement benefits and other optional forms of benefit for which ERISA grants lesser protection). Because ERISA requires only that accrued benefits, and not retirement-type subsidies, be paid to participants who elect a lump-sum distribution, *see* 29 U.S.C. § 1054(c)(3), the decision below, like those of other courts that have conflated these forms of benefits, threatens to impose on plans substantial liability and pension design burdens that ERISA does not mandate and that plan sponsors have not

anticipated. This Court's review is needed to clarify the distinction between accrued benefits and those benefits subject to lesser ERISA protection, and thus eliminate lower court confusion that unnecessarily increases the already significant financial burden imposed on companies that provide a traditional, defined benefit form of pension plan.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 07-906

IN THE
Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS, Individually and on Behalf of Others Similarly Situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* BRIEF AND BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus curiae the National Association of Manufacturers ("NAM") hereby moves this Court for leave to file this *amicus* brief.

The NAM is the nation's largest industrial trade association, representing approximately 11,000 small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The brief of *amicus* NAM seeks to bring to the Court's attention trenchant public policy reasons that make granting *certiorari* in this case appropriate and important.

February 7, 2008

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Mandatory Inclusion of COLA Would Have Substantial Negative Impact on Other Defined Benefit Plans 5

A. There is a substantial risk of underfunding of retirement plans 5

B. Annuities are preferable to lump sum distributions from a public policy perspective 6

II. The Seventh Circuit's *per se* Definition of "Accrued Benefit" is Inconsistent with ERISA's Plain Language and This Court's Precedents 11

TABLE OF CONTENTS (cont'd)

III. There is A Conflict Among Circuits With Respect to the Meaning of "Accrued Benefit" 14

Conclusion 16

TABLE OF AUTHORITIES

page

CASES

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 2-3, 11, 12,13, 16

Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r,
318 F.3d 599 (4th Cir. 2003) 3, 15, 16

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TABLE OF AUTHORITIES (cont'd)

page

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TABLE OF AUTHORITIES (cont'd)

page

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INTEREST OF THE *AMICUS*[1]

The National Association of Manufacturers is the nation's largest industrial trade association, representing approximately 11,000 small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. Many of its members will be affected by the decision in this case.

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[1] Counsel for *amicus* timely served the ten-day notice required by Rule 37.2(a) on counsel of record for the parties. Counsel for respondents declined to consent to the filing of this brief, thus requiring the motion for leave to file.

Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution to its preparation or submission. Robert A. Lonergan, Executive Vice President and General Counsel of Rohm and Haas Company, is a member of the Board of Directors of Atlantic Legal Foundation; he did not participate in any way in the decision of Atlantic Legal Foundation to represent the *amicus* in this case. Rohm and Haas Company has made annual contributions to Atlantic Legal Foundation in the past four years for the Foundation's general operating expenses, representing less than 2.0% of the budget of the Foundation during that period, and these contributions did not affect the decision of Atlantic Legal Foundation to represent the NAM as *amicus* in this case.

SUMMARY OF ARGUMENT

The Seventh Circuit held that a cost-of-living adjustment ("COLA") available to participants who elect to receive their benefits as a monthly annuity payment under the terms a retirement plan under the Employee Retirement Income Security Act ("ERISA") is part of the Plan participants' "accrued benefit" even though the Plan's provisions explicitly *exclude* the COLA from the definition of "accrued benefit" and that the COLA must therefore be provided to every participant in the Plan, including those who select a lump-sum distribution of their benefits.

Mandatory inclusion of COLA would have substantial negative impacts on other defined benefit plans, and encouraging lump sum withdrawals of pension funds increases the already substantial risk of underfunding of pension plans and exposes defined benefit pension plans to unforeseen financial liabilities that may leave many such plans chronically underfunded.

From a public policy perspective, annuities are preferable to lump sum distributions because lump sum distributions increase the risk that retirees will exhaust their retirement funds prematurely, placing a burden on the public fisc.

The Seventh Circuit overrode the clear language of the Rohm and Haas pension plan, which informed plan participants that no COLA would be paid on lump sum withdrawals, and expands the benefits available to participants beyond those they could reasonably have expected to receive under the Plan. The decision below is in conflict with the teaching of this Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) that the plan itself determines the level of benefits, and with the statutory definition of "accrued benefit" under

ERISA, which expressly states that an "individual's accrued benefit" is to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

The Seventh Circuit's conclusion that a COLA is *per se* a component of a plan participant's "accrued benefit" also conflicts with decisions of the Fourth Circuit (*Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599 (4th Cir. 2003)) and Ninth Circuit (*San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994)) which held that a COLA is a component of a participant's "accrued benefit" only when the terms of the plan so provide, and conflicts with ERISA, which provides that an "individual's accrued benefit" is to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

Certiorari is warranted to resolve the lower courts' conflict regarding the definition of "accrued benefit" under ERISA, to reconcile the decision below with ERISA's plain language, and to ensure that defined benefit pension plans – many of which are already facing significant funding shortfalls – are not burdened with liabilities that employers did not agree to pay, which they did not assume in their actuarial calculations, and they may be unable to bear.

ARGUMENT

The Seventh Circuit overrode the clear language of the Rohm and Haas pension plan, which clearly informed plan participants that no COLA would be paid on lump sum withdrawals. The Seventh Circuit held that a COLA offered by a defined benefit pension plan is *always* part of a participant's accrued benefit, even if it is expressly excluded from the plan's definition of that term.

If not reversed, the Circuit Court's decision could have serious consequences for defined benefit pension plans. The decision requires those plans which are funded on the actuarial assumption that a COLA provided to monthly annuitants is not a component of the participants' accrued benefit, to provide a COLA to *all* participants, regardless of the provisions of the plan itself and the financial projections of its sponsor, and prevents those plans from thereafter reducing the COLA's amount due to the "anti-cutback" rule, 29 U.S.C.A. § 1054(g). This new liability will place additional financial burdens on the plans and their sponsors. In addition, the addition of a COLA to lump sum withdrawals increases the incentive for retirees to choose lump sum distribution, which in turn increases the risk that those retirees will draw down their retirement funds prematurely.

I. MANDATORY INCLUSION OF COLA WOULD HAVE SUBSTANTIAL NEGATIVE IMPACT ON OTHER DEFINED BENEFIT PLANS

A. There is a substantial risk of underfunding of retirement.

If the Seventh Circuit was correct in holding that ERISA determines what an accrued benefit is mandatory, notwithstanding a plan's own definition of an accrued benefit and notwithstanding the actuarial calculations of the Plan's sponsor based on the Plan's definitions, many plans may be underfunded because addition of a COLA to lump sum withdrawals undoubtedly places greater burdens on the financial resources of a Plan. The Seventh Circuit's decision compels defined benefit pension plans to shift a portion of their resources from paying annuitants their expected benefits to funding an unexpected and unwarranted COLA for lump-sum recipients.

If plan sponsors, plan administrators, and plan participants did not know whether a benefit is an accrued benefit at the time the Plan was designed and funded, the extent of a plan's liability would be difficult to predict. This, in turn, could result in prevalent underfunding of pension plans, which in turn would lead to the need for additional government funding through the Pension Benefit Guaranty Corporation ("PBGC"). This would lead to increases in PBGC rates for corporate employers. If underfunding occurs the government fisc -- ultimately taxpayers -- will have to cover the shortfall.

B. Annuities are preferable to lump sum distributions from a public policy perspective.

There is already a noticeable, and dangerous, trend toward participants choosing lump sum payments, if they have that option, which the Circuit Court's decision only encourages. A leading actuarial firm has recently written:

> [M]ore defined benefit plans have been paying out benefits in the form of lump sums. In its most recent survey of employee benefits in private industry, the Bureau of Labor Statistics found that 43 percent of all private defined benefit plans offered lump sums and that the overwhelming majority of these allowed workers to take their total benefit in this form (U.S. DOL, 2003: 66)[2] . . . . but there is considerable anecdotal evidence suggesting that, when offered a choice, most retirees choose the lump sum . . . . some employers are worried about workers losing this important traditional pension insurance against longevity risk.
>
> To the extent that lump sums are available, retirees can convert their lump sums into steady, reliable, lifelong income streams. But the evidence so far suggests that they are not doing so. For example, private, tax-qualified retirement plans disbursed $273 billion

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[2] U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2555, National Compensation Survey: Employee Benefits in Private Industry in the United States, 2000 (2003).

> benefits in 1998, nearly 60 percent of that from defined contribution plans. Roughly 30 percent to 40 percent of retirees under private defined benefit plans are taking lump sums. This suggests that as much as three-quarters of private pension distributions in 1998 were cash-outs, most of them to new retirees. And by 1998, many workers who had cashed out of plans earlier and rolled their assets into IRAs had retired and were using those assets to support themselves.

Watson Wyatt Worldwide[3], "Tales of the Dodo Bird and the Yellowstone Wolf: Lessons for DB Pensions and the Retirement Ecosystem," available at http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=15066.

Current policy towards pension plans in the United States discourages annuitization because defined contribution plans are not required to offer an annuity option. Retirees are under-annuitized given the economic value of annuitiziation. *See, e.g.*, Brown, Jeffrey R. and Warshawsky, Mark J., "Longevity-Insured Retirement Distributions From Pension Plans: Market and Regulatory Factors," National Bureau of Economic Research Working Paper 8064 (Jan. 2001) ("Yaari (1965) [Yaari, Menahem E., "Uncertain Lifetime, Life Insurance, and the Theory of the Consumer," *Review of Economic Studies* 32:137-150 (1965)] was the first to demonstrate the economic

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[3] Watson Wyatt Worldwide is an actuarial firm which traces its roots back to the oldest actuarial firm in the world and has an international pension consulting practice.

value of annuitization in a life cycle model with uncertain lifetimes. Within this lifecycle model, the gains from annuitization are substantial. Given this, economists have been somewhat puzzled by the limited extent of annuitization outside of defined benefit plans and Social Security."); *see also* Mitchell, Olivia S., *et al.*, "New Evidence on the Money's Worth of Individual Annuities," National Bureau of Economic Research Working Paper (April 1997) (concerning single-premium, immediate, individual annuities). Among the hypothesized reasons for the apparent lack of annuitization are costs making annuitization less economically attractive and the absence of inflation protection.

A decade ago, the Department of Labor Advisory Council on Employee Welfare and Pension Benefits Working Group noted that "The shift in retirement savings from defined benefit plans to defined contribution plans is well documented." (United States Department of Labor, Advisory Council on Employee Welfare and Pension Benefits, Report of the Working Group on Retirement Plan Leakage: "Are We Cashing Out Our Future?" (November 18, 1998), available at http://www.dol.gov/ebsa/adcoun/leaknew1.htm at 6 (last accessed 1/13/2008), found that the largest source of leakage was lump sum distributions (*id.* at 7), and that "[T]he number of lump sum distributions will increase. It is critical that the leakage of lump sum distributions from retirement plans be slowed." (*Id.* at 9) The Working Group proposed making annuities the default distribution option in defined contribution plans. (*Id.* at 10).

Employer-provided pensions are "undergo ing a dramatic shift towards defined contribution (DC) plans, in which over 70 percent of participants are not even offered a life annuity as a payout option" despite the fact that annuitization is an important way of

insuring against longevity risk. The lack of opportunity to annuitize within the plan or failure of retirees to opt for annuity distribution because there are no incentives to do so is troubling. "Existing public policy towards private pensions does not encourage annuitization of private retirement resources," but public policy should encourage annuitization because "Annuities have an important role to play in retirement portfolios as a way of insuring that individuals do not outlive their resources." . *See* Brown, Jeffery R., "How Should We Insure Longevity Risk in Pensions and Social Security?" (Center for Retirement Research at Boston College, August 2000, available at http://crr.bc.edu/images/stories/Briefs/ib_4.pdf (last accessed 02/06/2008)) (The primary appeal of the [privately purchased] life annuity is that it offers retirees the opportunity to insure against the risk of outliving their assets by exchanging these assets for a lifelong stream of guaranteed income.)

Moreover, legislative history supports the proposition that annuities are preferable to lump sum distributions.

The House Ways and Means Committee Report for the Pension Protection Act of 2005, (United States House of Representatives, Ways and Means Committee, Report for the Pension Protection Act of 2005, 109th Cong., 1st Sess., House Report 109-232, Part 2) advocated an increase in the interest rate used to compute the lump-sum distribution because:

> "[U]sing an artificially low interest rate in calculating lump sums will result in inflated lump sums which are not the actuarial equivalent of a lifetime annuity. *This makes lump sums more attractive than an annuity, thereby encouraging more employees to take*

> *lump-sum distributions. This may reduce retirement income security by discouraging annuitization. This also leads to a drain on pension plan assets, which can undermine the retirement income security of other plan participants.*"

(*Id.* at 108. Emphasis supplied).

We respectfully submit that there are sound policy reasons, related both to the viability of company pension plans and retirement security for employees, that the Seventh Circuit be reversed and this Court reaffirm that a plan and its employer sponsor has the flexibility to use a COLA as an incentive for retirees to take the benefit in the form of an annuity because of the concern that retirees who do not choose annuities will not adequately budget for their retirement in the long term.

II. THE SEVENTH CIRCUIT'S *PER SE* DEFINITION OF "ACCRUED BENEFIT" IS INCONSISTENT WITH ERISA'S PLAIN LANGUAGE AND THIS COURT'S PRECEDENTS

The Seventh Circuit's conclusion that a COLA is *always* a component of a plan participant's accrued benefit, even though it is explicitly excluded from the definition of "accrued benefit" by the terms of the plan, is squarely at odds with the plain language of ERISA and Congress's intentions when enacting the statute.

ERISA does not require employers to establish pension benefit plans or to provide any specific level of benefits when such plans have been established. *Spink,* 517 U.S. at 887. "[P]rivate parties, not the Government, control the level of benefits" provided by a pension plan through their control over the terms of the plan. *Alessi,* 451 U.S. at 511. ERISA simply ensures that participants actually receive the benefits promised under a plan's terms. *See Cent. Laborers' Pension Fund v. Heinz,* 541 U.S. 739, 743 (2004).

Further, ERISA provides that a participant's accrued benefit is to be "determined under the plan" itself. 29 U.S.C. § 1002(23)(A). The terms of the Rohm and Haas Pension Plan exclude the COLA from the definition of a participant's "accrued benefit." Pet. App. 4a; Pet. App. 69a. The Seventh Circuit's conclusion that the COLA constitutes part of every participant's "accrued benefit" squarely contradicts the plain language of ERISA, which directs courts to look to the plan's terms when defining a participant's "accrued benefit," and squarely conflicts with ERISA's objective of "protecting employees' justified expectations of receiving the benefits their employers promise them." *Heinz, supra* (emphasis added); *see also Alessi,* 451 U.S. at 511. Participants in the Plan who elected to

receive their benefits in a single lump-sum distribution could not have expected to receive a COLA because Plan expressly provides that a COLA is available *only* to participants who elect monthly annuity payments. *See, e.g.*, Pet. App. 59a.

ERISA specifies that an accrued benefit is to be *"determined* under the plan" and it is *"expressed* in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A) (emphases added). The Seventh Circuit's decision negates the first element of the statutory definition by holding that any benefit that would be paid as part of a retiree's "annual benefit" is part of the "accrued benefit," even if expressly excluded from the definition of "accrued benefit" by the terms of the plan. The decision on which the Seventh Circuit relied, *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Union*, 980 F.2d 465 (7th Cir. 1992), stated that an "accrued benefit is, 'in the case of a defined benefit plan, . . . an annual benefit commencing at normal retirement age.'" *Id.* at 468 (citing 29 U.S.C. § 1002(23)(A)), and explicitly read the "determined under the plan" language out of the statutory definition.[4] In

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[4] We believe that *Hickey* is distinguishable, and did not ineluctably lead to the Seventh Circuit's decision in this case. The plan at issue in *Hickey* was a "monthly accrued [defined] benefit" payment plan and the plan itself provided "that on each anniversary of a participant's retirement, the participant's monthly benefit was to be multiplied by an adjustment factor. . .[that] depended upon the increase in the CPI over the prior year." (*Hickey*, 980 F.2d at 467). Thus, in *Hickey*, there was no dispute that the plan itself provided for a COLA. Rather, the issue there was whether the plan could be terminated without providing funding for future increases in the cost of living. The *Hickey* court

(continued...)

the decision below, the Seventh Circuit perpetuated this erroneous statutory interpretation.

This Court's review is warranted to correct the Seventh Circuit's erroneous interpretation of ERISA and to ensure that "private parties" in fact determine "the level of benefits" provided by a plan. *Alessi*, 451 U.S. at 511.

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[4](...continued)
correctly "[v]iew[ed the plan as a whole" and held that "[T]he COLA was inseparably tied to the monthly retirement benefit as a means for maintaining the real value of that benefit. It could not, therefore, be said to be ancillary to the benefit. . . ." *Id.* at 468. In *Hickey* the Court correctly noted that the Summary Plan Description listed cost-of-living benefits as one component of the "normal retirement benefit," and that the summary plan description explained that the COLA would increase the monthly benefits to reflect changes in the cost-of-living and thus plan sponsor treated the COLA as part of the normal benefit rather than a separate unguaranteed benefit. 980 F.2d at 469. This, of course is in sharp contrast to the language of the Rohm and Haas Pension Plan, which explicitly and clearly informed employees that if the elected the lump sum payment option they would receive no COLA.

III. THERE IS A CONFLICT AMONG CIRCUITS WITH RESPECT TO THE MEANING OF "ACCRUED BENEFIT"

The Seventh Circuit held that the "term 'accrued benefit' has a statutory meaning" that always includes a COLA and that "the parties cannot change" that meaning by agreeing on varying a plan's language that explicitly excluding a COLA for one form of payout. 497 F.3d 710, 713, Pet. App. 6a (internal quotation marks omitted). The Seventh Circuit declined to "look to the terms of the plan" when deciding whether the COLA was a component of respondent's "accrued benefit" and instead applied a *per se* rule that any COLA offered to a monthly annuitant is a part of the "accrued benefit" of every plan participant.

The Seventh Circuit's holding conflicts with decisions of the Fourth and Ninth Circuits utilizing a case-by-case approach that looks to a plan's terms to determine whether a COLA constitutes part of a participant's "accrued benefit."

The Ninth Circuit in *San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994) held that a COLA was not part of the plan's "accrued benefit" because, under the terms of that plan, the COLA was promised for only a limited period of time. *Id.* at *4. The court explained that the "purpose underlying ERISA's protection of accrued benefits is protection of employee expectations." *Id.* Because the plan stated that "[n]o COLAs were to be provided beyond" the limited period set forth in the plan, the COLA was "not an accrued benefit under ERISA" and its elimination did not violate the "anticutback rule." *Id.*

In *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner*, 318 F.3d 599 (4th Cir. 2003), the Fourth Circuit held that a COLA did not constitute an "accrued benefit" for participants who retired before the COLA had been implemented because the terms of the plan in effect at the time of the participants' retirement did not provide for a COLA. *Id.* at 605. Construing the definition of "accrued benefit" in the Internal Revenue Code, the Fourth Circuit explained that the "definition does not purport to describe what counts as an 'accrued benefit' for *all* participants in *all* qualifying plans. Rather, the statutory definition is a signpost directing us to look to the terms of the plan at issue." *Id.* at 602-03 (citing I.R.C. § 411(a)(7)(A)(I)) (emphases added).[5] *See also Nobel v. Vitro Corp.*, 885 F.2d 1180, 1195 (4th Cir. 1989) (the terms of an ERISA plan can lawfully provide participants who select monthly annuity payments with enhanced benefits beyond their accrued benefit and those enhanced benefits need not be provided to participants who elect a lump-sum distribution).

The Seventh Circuit's holding that a COLA, if provided to any class of participants, is *always* part of *every* participant's "accrued benefit," regardless of the express terms of the plan, is directly at odds with the holdings of the Fourth and Ninth Circuits.

The approach used by Ninth and Fourth Circuits, which "look[ed] to the terms of the plan at issue" and determin[ed] that the plan did not include a COLA in its definition of "accrued benefit," *Sheet Metal Workers*, 318 F.3d at 602-03, is consistent with the teaching of

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[5] The definition of "accrued benefit" in Section 411 of the Internal Revenue Code, 26 U.S.C. § 411(a)(7)(A)(I), is substantively identical to ERISA's, 29 U.S.C. § 1054(c)(3).

this Court in *Alessi*, 451 U.S. 504, 511 (private parties, not the Government, control the level of benefits provided by a pension plan through their control over the terms of the plan), in *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, ("ERISA [does not] mandate what kind of benefits employers must provide if they choose to have such a plan.") and in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) ("employers have large leeway to design disability and other welfare plans as they see fit").

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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